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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Washington, D.C. 20554

CC Docket No. 91-141

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Company Facilities	

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY

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I. INTRODUCTION

1. The Commission is beginning this proceeding to remove barriers that currently impede the development of greater competition in the provision of interstate access transmission facilities, and thereby unlock the potential for a substantially broadened scope of competition in interstate telecommunications. In light of changing technological and market conditions, the Commission proposes to require that the Tier 1 local telephone companies[1] offer expanded opportunities for interconnection with their local carrier networks for the provision of interstate special access service. We also begin an inquiry into expanded interconnection for the provision of interstate switched transport service.

2. For many years, local exchange carriers (LECs) faced little or no competition in providing the local access facilities and services used in the provision of interstate telecommunications.[2] Recent changes, however, have facilitated the development of competition in the provision of these facilities and services. Most importantly, fiber optic technology has advanced rapidly, significantly increasing capacity and sharply reducing per-circuit costs. Intensified interstate long-distance competition, when combined with the American Telephone and Telegraph Company's (AT&T's) divestiture of the Bell Operating Companies (BOCs) and the implementation of federal equal access and access charge systems, have greatly increased interexchange carrier (IXC) and end user incentives to seek lower cost options for interstate access. As American business becomes more information-dependent, customer demand for communications services with enhanced reliability has also grown. While the LECs still provide the vast majority of interstate access services, fiber-based carriers, sometimes described as Competitive Access Providers (CAPs), now offer access services to large business customers in the central business districts of many major cities.[3]

3. Expanded access competition has the potential to produce substantial benefits through expanded customer choice, improved efficiency, and the more rapid deployment of new technology. At the same time, such competition will impact current LEC rates and structures, bringing major changes for the LEC industry and communications users.

4. The action proposed in this notice is a measured step toward broader competition in the provision of interstate access services and facilities. The improved arrangements for interconnection with LEC facilities which we are proposing will substantially expand the universe of customers who can be served by the new competitive entrants, and increase the scope of LEC offerings subject to competition. At the same time, we have restricted our proposal to the provision of special access service, which is used largely by business customers. While this will at least initially limit the potential benefits of expanded competi-

[1] Tier 1 exchange carriers are those exchange carriers with more than $100 million in annual interstate revenues for a sustained period of time.

[2] In perhaps the simplest example, interstate access consists of the delivery by a caller's local telephone company of an originating interstate telephone call to the facilities of an interstate long-distance carrier, and the completion of the call by a second local telephone company from the long-distance carrier to the called party.

[3] End users also use microwave and other radio-based facilities in lieu of LEC access services in some cases, and other technologies also have the potential of providing alternatives to LEC access services in certain circumstances.

tion, this particular step does not require complex adjustments in switched access rates that may indirectly affect residential customers.

5. The notice of inquiry concerning expanded interconnection for the provision of switched transport, which is used, for example, in the provision of message telephone service (MTS), will generate additional information concerning the potential benefits and drawbacks of further steps to broaden interstate access competition. Based on that information, we will decide whether to proceed with a broader proposal for interstate access competition.

II. NOTICE OF PROPOSED RULEMAKING ON SPECIAL ACCESS INTERCONNECTION

A. Background

6. The current interstate access tariffs effectively limit the ability of interested parties to substitute their own or a third parties' facilities for portions of LEC special access facilities. The current special access tariffs generally impose a flat charge for transmission between the end user's premises and the local telephone company's end office serving that customer, a distance sensitive charge for transmission between LEC central offices (if both end points on the circuit are not served by the same central office), and a flat charge for transmission between the second LEC central office and the customer designated end point, such as an IXC point of presence (POP).[4] The premises-to-end-office and the end-office-to-POP segments are usually called channel terminations and are subject to the same charge. The interoffice element is usually called channel mileage. The tariffs also contain separate charges for certain central office special features.

7. This special access rate structure effectively precludes a CAP or other interested party from interconnecting with a LEC to provide either the premises-to-end-office or the end-office-to-POP segment of a special access line. This results from the fact that the CAP or other interconnecting party would be required to pay both LEC channel termination charges regardless of whether it substituted its own facilities for virtually all of one of the LEC transmission segments. Therefore, the CAP or other interconnecting party apparently could not offer the premises-to-end-office or the end-office-to POP segments alone at an economically competitive price.

8. For example, under the current tariff structure, a large customer cannot, as a practical matter, deliver its interstate traffic to an IXC POP using LEC access facilities from its location to the LEC central office and CAP transmission facilities from there, or a point just outside the central office, to the IXC premises. Assuming that the customer location and the POP are served by the same central office, a customer using CAP facilities in this manner would pay two channel termination charges to reach the CAP facilities in addition to the CAP charges. By paying the two channel termination charges directly to the LEC, however, the customer could also reach the POP directly without incurring any CAP charges. Accordingly, the customer must choose between using LEC facilities for the entire special access connection or bypassing the LEC entirely through third-party facilities that connect the customer location directly with the IXC.

9. As a result, CAPs are seeking new interstate interconnection arrangements that would allow them to interconnect at, or near, the LEC central office under rates, terms, and conditions different from those in the present access tariffs. The CAPs seek the right to interconnect with the LECs either by locating their own equipment in the LEC central office, or by interconnecting with the LEC at a point adjacent to the central office under rates, terms, and conditions that they argue would more accurately reflect the facilities they use. In particular, Metropolitan Fiber Systems (MFS) filed a Petition for Rulemaking on November 14, 1989, requesting that we develop rules providing CAPs with access to the BOC access networks on reasonable and nondiscriminatory terms through the unbundling of each component of the exchange access network on a cost-supported basis.[5] The Commission sought comment on the MFS Petition and more than thirty parties filed comments or replies, which were considered in deciding to initiate this proceeding.[6]

10. IXCs and large users have generally supported CAP requests for expanded interstate interconnection rights. While certain LECs have entered into, or are currently negotiating, intrastate arrangements for expanded interconnection, LECs generally have argued that expanded interconnection opportunities for third parties require that regulators permit substantially greater LEC pricing flexibility.[7] Some states have established expanded interconnection policies for intrastate services, while regulators from other states have expressed concern about such initiatives. NARUC and a number of states have also raised questions about the potential effect of federal interconnection actions on state interests.

B. Effects of Expanded Interconnection

11. The Commission has long pursued regulatory policies removing barriers to full competition in telecommunications when possible. In the interstate telecommunications market, the prod of competition has led to greater customer choice, the more efficient provision of products and services desired by customers, and a more rapid deployment of advanced telecommunications technologies. For example, competition in the provision of interstate long-distance service has led to sharply reduced rates, a larger variety of service options, and more rapid deployment of new technologies such as fiber optics and digital switching. Similar advantages have flowed to residential and business consumers with the advent of competition in the provision of Customer Premises Equipment (CPE). In both instances, Commission decisions to mandate new forms of interconnection with telephone company monopoly facilities were crucial to the development of competition.

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[4] For the sake of simplicity in discussing the special access rate structure, we will assume that the customer is connecting to an IXC POP.

[5] MFS has proposed a bidding process to determine whether the LEC or the CAP would provide interconnection facilities.

[6] A list of the parties commenting on the MFS Petition is contained in Appendix A. In 1987, Teleport also filed a Petition for Declaratory Ruling which raised similar issues.

[7] The LECs which have negotiated expanded interconnection agreements with CAPs include New York Telephone Company, New England Telephone and Telegraph Company, Illinois Bell Telephone Company, and Pacific Telesis.

12. Based on our past experience with competition and on our understanding of the provision of interstate special access-type services, we tentatively conclude that current LEC interstate special access interconnection arrangements create a significant barrier to the competitive provision of interstate special access transmission links. The customer seeking competitive alternatives must either find a LEC competitor with facilities that interconnect all the necessary points without any use of LEC facilities, or build such a network itself. Expanded interconnection arrangements would significantly increase the opportunities for special access competition by permitting a customer to choose competitively provided special access links between a LEC central office and a POP, for example, and LEC special access transmission facilities elsewhere.

13. We believe removing the barriers present in current LEC special access tariffs to allow greater competition will result in substantial benefits. Expanded interconnection will subject LEC operations more directly to the discipline of greater competition, and thus strongly complement the proefficiency incentives of LEC price cap regulation. Increased interstate special access competition should lower theprice of services subject to competition, and, in the long term, increase the overall efficiency of LEC operations. It should also provide a competitive spur for the LECs to deploy new technologies and improve service quality.

14. Expanded interconnection should also increase customer choice. Greater competition will place a premium on offering customers new and innovative features. For instance, customers in need of enhanced service reliability should find a greater selection of services meeting more rigid technical specifications or more stringent installation and maintenance intervals. Increased competition also should enhance customer choices in establishing redundant facilities for network reliability. At present, customers in areas served by a CAP can purchase wholly separate sets of special access facilities from the LEC and the CAP for redundancy. Expanded interconnection would provide customers with additional options -- they could, for instance, establish redundant LEC and third-party facilities for only those portions of their special access networks perceived to be most at risk. Depending on the nature of the network failure of most concern to the customer and the tradeoffs of costs and benefits, individual customers could then select the set of facilities that best meet their redundancy needs.

15. At the same time, competition will tend to bring pressure to bear on any non-economic support flows reflected in the current special access tariffs. While we believe that such support flows, to the extent they exist, are much more limited in the context of special access services than they are in the case of switched access services, the LECs may seek to increase rates for certain special access services. Whether the LECs seek such increases, and, if so, the extent of the increases sought, will be affected by a number of factors including the overall growth in demand for special access, and LEC efficiency gains.[8] Although certain changes in the pricing of LEC special access may be necessary in a competitive environment, the Commission remains sensitive to the possible effects of such adjustments on particular customer groups. We believe, however, that any necessary adjustments to LEC special access pricing can readily be achieved without undue hardships.

16. Based on this analysis, we tentatively conclude that expanded opportunities for third-party interconnection with LEC facilities for the provision of interstate special access services, with its likely increase in competition, will produce significant benefits for consumers that will outweigh any potential costs.[9] We invite interested parties to comment on this tentative conclusion. In particular, we ask commenting parties to address the potential benefits that they foresee from expanded special access interconnection, as well as any drawbacks that they anticipate.[10] We next consider the specific architecture for expanded interstate special access interconnection.

C. Interconnection Architecture

17. Section 201 of the Communications Act authorizes the Commission to establish interconnection standards for carriers. For expanded interstate special access interconnection, CAPs have proposed two alternative mandatory interconnection architectures -- one requiring interconnection in the LEC central office, with the physical collocation of interconnecting party equipment, and the other requiring interconnection adjacent to the LEC central office with economic and technical characteristics comparable to interconnection in the LEC office (sometimes called virtual collocation).[11] Either of these options permits expanded interconnection that, with limited exceptions, is not now available under LEC interstate tariffs,[12] although each has different implications for the LECs' operations and those of the interconnecting parties.

18. We tentatively conclude that the Commission should establish minimum criteria requiring implementation of expanded interconnection for interstate special

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[8] The LECs' ability to change rates is also subject to a variety of regulatory constraints.

[9] In the *BOC ONA Order*, the Commission directed the Information Industry Liaison Committee (IILC) to examine the technical and operational problems associated with fundamental unbundling of the network for the provision of enhanced services and to assess possible solutions. Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 43 (1989); 5 FCC Rcd 3084, 3086 (1990). The Commission indicated that the IILC should take up this issue only after addressing a variety of other issues, and the IILC has not produced any recommendations on this issue to date. Although we are proceeding with the network unbundling issues raised in this proceeding without awaiting a report, the IILC should continue to address other fundamental unbundling issues that are beyond the scope of this proceeding.

[10] Among other things, we invite parties to address the similarities and differences between the growth of interstate long-distance competition and the potential for interstate special access competition obtainable through expanded interconnection.

[11] Under either of these approaches, the interconnecting party would be allowed to use any special features included in the LEC special access tariff as well as LEC special access interoffice trunking.

[12] New Jersey Bell Telephone Company provides Teleport with virtual collocation for both intrastate and interstate special access under a special construction arrangement. The New York Telephone Company and the New England Telephone Company also offer a limited form of virtual collocation for the provision of special access in their interstate tariffs.

access. These minimum criteria can be met by either a physical[13] or virtual[14] collocation arrangement as each carrier chooses. We believe either approach would remove a major impediment to increased competition. Physical collocation would actually give the interconnector direct access to the central office. In proposing to allow the LECs to satisfy their interconnection obligations through virtual collocation meeting the minimum requirements proposed here, we hope to achieve the major benefits of physical collocation while still permitting the LECs a viable choice between physical and virtual collocation. Our tentative decision to require expanded options for the provision of special access, service represents a major step in Commission interconnection policy. When the Commission considered similar issues in the *Computer III*[15] and *Open Network Architecture* proceedings,[16] the Commission rejected proposals for mandatory physical or virtual collocation. Subsequent developments, including the record concerning the MFS petition, interconnection developments at the state level, and the voluntary use of the *Computer III* price parity rules, which represent a form of virtual collocation, lead us to believe that expanded interconnection opportunities have the potential to produce major benefits in this context.[17]

19. If a physical collocation approach is chosen by the carrier, we would expect that the interconnecting party would lease central office space in which to locate its own equipment necessary to terminate the transmission link in the LEC central office, such as multiplexers, demultiplexers, and DACS (digital access cross-connect switches) used to terminate fiber-based transmission links. The interconnecting party would also be granted physical access to the LEC central office so it can install and maintain the equipment.[18]

20. If a carrier chose a virtual collocation approach, the interconnecting party would connect with LEC network facilities at a location adjacent to the central office, such as in a manhole or nearby office space. Unlike physical collocation, all interconnection equipment located on the LEC premises would usually be owned or leased by the LEC, which is responsible for its installation and maintenance.[19] The interconnecting party would have no right to gain physical access to the LEC central office. Virtual collocation, however, removes a major impediment to increased competition by providing pricing arrangements that more closely approximate the results that physical collocation would produce.

21. We next turn to questions involving the minimum terms and conditions for interconnection. These standards would apply as appropriate regardless of whether the LEC chooses to satisfy its interconnection obligations through virtual or physical collocation. Our purpose in defining the rights of interconnecting parties is to remove the current barriers to competition. We also seek to achieve the major benefits of physical collocation to the extent feasible while still giving the LECs a realistic opportunity to provide interconnection through virtual collocation.

22. We tentatively conclude that an interconnecting party must be willing to interconnect its facilities with those of the LEC within one-eighth mile of a LEC central office in order to qualify for expanded interconnection.[20]

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[13] New York Telephone Company has chosen to implement physical collocation for the provision of intrastate services, although the state required only virtual collocation.

[14] For example, Illinois Bell Telephone Company and Teleport Communications Chicago, Inc. recently negotiated an agreement concerning the provision of intrastate private line connections employing a form of virtual collocation.

[15] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) *(Phase I Order)*, *recon.*, 2 FCC Rcd 3035 (1987) *(Phase I Reconsideration Order)*, *further recon.*, 3 FCC Rcd 1135 (1988) *(Phase I Further Reconsideration Order)*, *second further reconsideration*, 4 FCC Rcd 5927 (1989) *(Phase I Second Further Reconsideration Order)*, *Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990), *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (DC Cir. pet. for review filed May 16, 1988); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (1987) *(Phase II Order)*, *recon.*, 3 FCC Rcd 1150 (1988) *(Phase II Reconsideration Order)*, *further recon.*, 4 FCC Rcd 5927 (1989) *(Phase II Further Reconsideration Order)*, *Phase II Order vacated sub nom.* California v. FCC, 905 F2d 1217 (9th Cir, 1990), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir. pet. for rev. filed May 13, 1988).

[16] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, *Memorandum Opinion and Order*, 4 FCC Rcd 1 (1988) *(BOC ONA Order)*, *recon.*, 5 FCC Rcd 3085 (1990), *pets. for review pending sub nom.*, MCI v. FCC, DC Cir. No. 90-1332 (filed July 5, 1990), *further order*, 5 FCC Rcd 3103 (1990) *(BOC Amended Plans Order)*.

[17] We believe that interconnection in this proceeding, which deals with competition in the provision of interstate transmission links, involves different considerations than collocation in the context of *Computer III*, which dealt with competition in the provision of enhanced services. In *Computer III*, enhanced service providers (ESPs) sought collocation of their enhanced service computers in BOC central offices largely in order to avoid transmission costs for the link between their premises and the LEC central office, costs which would not have applied to a BOC enhanced services operation with enhanced service computers collocated in the central office. This concern has been dealt with through the price parity rules, which treat ESP equipment located within two miles of the central office the same as collocated LEC enhanced service equipment for purposes of transmission charges. ESPs are thus able to compete on an equal basis with the BOCs in the provision of enhanced services through remotely located computers. Here, by contrast, the provision of fiber optic transmission links by interconnecting parties requires that equipment, such as multiplexers, be placed in the LEC central office for use by the interconnecting party. That electronic equipment, in fact, is essential to the very nature of the transmission services being competitively provided under expanded interconnection, and determines the availability of monitoring and control and associated capabilities. Accordingly, our tentative decision to require expanded interconnection for the purpose of providing special access does not require or warrant a reevaluation of the decision not to mandate collocation for different purposes in *Computer III*.

[18] Physical collocation involves the greatest degree of change in current LEC operations since it requires that the LECs make space in their central offices available to competitors and allow the competitors' employees access to LEC facilities. As a result, this form of interconnection can raise questions of space availability and security.

[19] The Illinois Bell Telephone Company leases central office electronic equipment from Teleport at rates shown in their intrastate interconnection agreement. The lease terminates if Teleport discontinues the service provided through the leased central office equipment. *See* Supplier Agreement Between Illinois Bell Telephone Company and Teleport Communications Chicago, Inc., at sections 2 and 3.

[20] An interconnecting party could, of course, interconnect with LEC facilities further from the LEC central office and pay additional charges reflecting its greater use of LEC facilities.

Thus, parties interconnecting with the LEC within this radius would qualify for the lower interconnection rates which would be tariffed to implement the LECs' expanded interconnection obligations. Establishment of this as the "interconnection point" for purposes of virtual collocation appears to provide interconnectors a reasonable opportunity to qualify for expanded interconnection.[21]

23. We tentatively conclude that an interconnecting party should have the ability to monitor and control that party's circuits terminating in the LEC central office under virtual collocation arrangements. This will permit the interconnector to specify performance standards and detect service problems on its circuits, and reconfigure them as necessary to avoid service degredation or outages. It does not appear that interconnecting parties should be forced to rely on the LECs for these functions when the interconnector can reasonably perform such functions itself. The Commission has previously recognized the importance of monitoring and control functions in the context of ONA,[22] and this has been an important element in most of the intrastate agreements on expanded interconnection to date. Of course, an interconnecting party would also have this right under a physical collocation arrangement.

24. Under a virtual collocation approach, we may be required to determine the relative rights and obligations of the LEC and the interconnecting party regarding the designation of the type and make of interconnection equipment in the LEC central office dedicated to that party's use. One option would be to require the LEC to provide any electronic interconnection equipment designated by the customer, subject solely to public health and safety code considerations and existing technical network interconnection standards. This approach resembles physical collocation insofar as it permits the interconnecting party to choose the central office interconnection equipment. However, the approach potentially imposes additional costs on the LEC insofar as it could require the training of LEC personnel to install and maintain electronic equipment the LEC does not otherwise use in its network. Another option under virtual collocation would be to require the interconnecting party to use central office equipment already used by the LEC for the provision of its services. This would require that the interconnecting party use electronic equipment at its end of the interconnected circuit compatible with the LEC central office equipment. This requirement could well limit an interconnecting party's ability to implement more sophisticated monitoring and control capabilities available through its choice of electronics.

25. We tentatively conclude that under a virtual collocation approach, a LEC should be under an obligation reasonably to make available central office electronic equipment designated by the interconnector.[23] We believe that the ability to designate the central office electronics to be used with a circuit is integral to the ability to provide the transmission path itself, and should be permitted whenever reasonably feasible. While this approach may impose additional costs on the LECs, it does not appear to be unduly expensive given the importance of the central office electronic equipment to the transmission. Moreover, we believe the additional kinds of equipment specified by interconnecting parties will be sufficiently limited that this requirement will not impose undue burdens on the LECs.[24]

26. It may also be necessary for the Commission to specify additional terms and conditions for interconnection in order to ensure that virtual collocation is fully successful in removing the current barriers to competition, and achieves the major benefits of physical collocation while permitting the LECs the flexibility to provide interconnection through virtual collocation.

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[21] The distance from the LEC central office to the connection point, up to one-eighth of a mile from the central office covered by the connection charge, represents the minimum use of LEC facilities for which a customer must pay when interconnecting under our proposed virtual collocation architecture. If the interconnection point were, for example, set at two miles from the central office, customers within that radius would have to pay for two miles of LEC transmission facilities at a minimum even if they interconnected with a CAP one half mile from the central office. Since the LEC connection charge alone will always be less than the sum of the LEC connection charge and CAP charges, the LEC facilities covered by the connection charge basically constitute a zone within which interconnecting parties cannot compete with LEC facilities. As a result, we believe that the connection charge should cover the least transmission facilities reasonably feasible. Use of the two mile rule established in *Computer III* for purposes of applying the price parity rules for Enhanced Service Provider (ESP) interconnection would not be appropriate here in light of these considerations.

[22] In the *ONA* proceeding, the Commission required that the BOCs permit ESPs and other customers access to the following BOC Operations Support Systems (OSS) functionalities, affecting the BOC facilities used by the customer: (1) service order entry and status; (2) trouble reporting and status; (3) diagnostics, monitoring, testing, and network reconfiguration; and (4) traffic data collection. In light of operational security and privacy concerns, the Commission required that ESPs as well as the BOC enhanced services operations access these functions through a gateway. The Commission also required that the BOCs continue to pursue progress on access to OSS functionalities through the IILC and report back to the Commission in their April 1991 ONA Plan Amendments. *BOC Amended Plans Order*, 5 FCC Rcd 3108, 3107-3109 (1990). A CAP or other interconnecting party could also order BOC OSS functions available through the BOC ONA tariffs.

> Under our proposal, an ESP could take advantage of the LEC expanded interconnection opportunities, including monitoring and control functions, for the purpose of providing special access service. This proposal is not intended, however, to modify the Commission's descisions concerning collocation for the purpose of providing enhanced services made in the context of *Computer III*.

[23] One issue that may arise in this context is how we should treat proprietary equipment protocols used by interconnection equipment acquired by the LECs and placed in the central office in order to meet the individual needs of interconnecting parties. For example, what network disclosure rules, if any, should apply to the LECs' provision of such interconnection equipment?

[24] If the variety of equipment types specified by interconnecting parties threatened to impose excessive costs on the LECs in particular situations, we would consider establishing reasonable limitations on the exercise of this right.

27. Due to differences between the way physical and virtual collocation arrangements are structured, we may need to consider certain terms and conditions specific to physical collocation as well. For example, should the Commission establish standards for space allocation among interconnecting parties or other requirements in the event that a LEC central office cannot accommodate everyone? Should the Commission address questions concerning central office security arrangements in conjunction with physical collocation in this proceeding, or should such matters be considered by the Commission only if the LECs and interconnecting parties cannot develop mutually satisfactory arrangements?

28. We invite interested parties to comment on our tentative decision to require interconnection either through physical or virtual collocation. We also ask interested parties to comment on the monitoring and control functionalities that should be made available to interconnecting parties, and how these functionalities should be provided, as well as the proposed standard for the interconnection point in the case of virtual collocation. In addition, we seek comment on whether we should specify additional minimum interconnection criteria. We also invite commenting parties to address the need for specific rules concerning space, operational, or maintenance issues arising under virtual collocation. In addition, interested parties are asked to comment on the need for regulatory requirements to govern situations in which a LEC chooses to offer physical collocation. For example, should the Commission establish additional regulatory standards for physical collocation? If so, what issues should be addressed?

29. We also ask parties to address the use of these standards to govern the interconnection with LEC facilities of transmission systems using non-fiber optic technology.

D. Parties Entitled to Expanded Interconnection

30. We propose that expanded interconnection for interstate special access be made available to all third parties, regardless of their possible classification as IXC, end user, CAP, or something else. Thus, we tentatively conclude that we should not limit expanded interconnection opportunities to entities holding themselves out to provide access service to the public on a common carrier basis, as proposed by MFS. Such a restriction might result in unreasonable discrimination or undue preferences that conflict with the goals of Section 202(a) of the Communications Act. Limiting expanded interconnection to CAPs would also be inconsistent with longstanding Commission policy against restricting the availability of particular kinds of interstate access to certain classes of access users.

31. In addition, a more inclusive approach could have advantages in terms of fostering interstate access competition. IXCs, for instance, are present in all LATAs, and at least the larger IXCs have communications facilities design, development and construction expertise. Thus, their participation could expand the geographic scope of access competition beyond areas served by CAPs and increase the LECs' incentives to improve efficiency. Furthermore, granting users expanded interconnection rights would permit service options for large users in locations not served by a CAP or an IXC interested in constructing separate facilities.

32. We invite interested parties to comment on our proposal to extend expanded interconnection to all third parties.

E. Carriers Required to Offer Expanded Interconnection

33. We tentatively conclude that our proposed expanded interconnection rules should apply to all Tier 1 LECs.[25] To date, requests for expanded interconnection opportunities have arisen almost exclusively in major metropolitan areas. Limiting the requirement for expanded interconnection offerings to Tier 1 LECs would not appear to limit significantly the potential development of competition in the provision of special access transmission links since these LECs serve more than ninety percent of the nation's access lines. This would also ensure that the smaller LECs are not subject to any undue hardship that might result from the imposition of expanded interconnection requirements in their often more isolated markets. Smaller LECs would, of course, be free to offer expanded interconnection to interested parties.

34. Because the Tier 1 LECs serve some sparsely populated areas, we also seek comment on the desirability of developing criteria for excluding some service areas of Tier 1 LECs from this requirement. For example, mandatory implementation of expanded interconnection might be limited to urban and suburban areas using criteria such as population density or the number of access lines per exchange.

35. We invite interested persons to comment on these proposals for defining the scope of the LEC obligation to provide expanded interconnection. Parties proposing broader application of these obligations should address the effects on smaller LECs. We also ask for comment on whether different requirements should be imposed when smaller LECs voluntarily offer expanded interconnection.

F. Rate Structure

36. In this section, we propose changes in the existing special access rate structure to reflect our proposal for expanded interconnection for the provision of interstate special access. The Part 69 access charge rate structure rules, applicable to both price cap and rate of return LECs, do not specify a particular rate structure for the provision of special access services. As previously mentioned, however, the current special access tariffs generally contain two major recurring charges. A flat-rate, non-distance-sensitive channel termination charge applies to the connections between the customer premise and the central office and to the connections between the central office and the IXC POP or other customer-designated end point.[26] A distance sensitive channel mileage charge also applies to the special access connection between LEC central offices, if one is required. Special features desired by the customer, such as special line conditioning as well as special multiplexing and bridging, are tariffed separately.

[25] *See* note 1 *supra*.

[26] Certain LECs use different terminology for the elements of the special access rate structure.

37. We tentatively conclude that the Commission should adopt new special access rate structure requirements in order to accommodate expanded interconnection for interstate special access. We seek comment on two alternatives for restructuring special access recurring charges to reflect virtual collocation.[27] Similar rate structure changes necessary to accommodate physical collocation are described later. The first rate structure option for implementation of virtual collocation would limit the changes in the current special access tariffs. The second option involves more comprehensive changes in the current access structure.[28]

38. Under the first alternative, LECs using virtual collocation would substitute a connection charge for interconnecting parties for one channel termination charge. Interconnectors would also pay separate charges for any special central office features, such as specially designated electronics.[29] We would not require changes in the rate structure for other LEC special access customers. Customers other than interconnecting parties would, absent LEC-initiated changes, continue to pay channel termination and interoffice mileage charges pursuant to the current tariffs. Thus, the net effect of this approach is to permit interconnectors to pay a connection charge in lieu of a channel termination charge. Interconnecting parties would also pay for any special central office features they used.[30]

39. As an alternative to this approach, we also seek comment on a plan for unbundling the current channel termination charge into separate connection and transmission charges in order to implement virtual collocation. Under this approach, the connection charge would apply to each special access circuit for the final connection of up to one-eighth mile from the interconnection point to a central office. The connection charge would also cover use of the central office facilities by both LEC special access customers and interconnecting parties. The transmission charge would apply to the LEC link between each customer-designated end point of the circuit and the interconnection point up to one-eighth of a mile from the central office. The transmission charge would include multiplexing and other electronic equipment used by the LEC, in its discretion, in place of additional transmission equipment. The LEC would retain existing discretion in establishing the rate structure applicable to interoffice transmission.

40. This unbundled structure would allow customers, including interconnecting parties, to order only the access services that they need. Thus, an interconnecting party would pay the connection charge, for service from the central office to the interconnection point up to one-eighth of a mile from the central office, but substitute its own transmission facilities "for those of the LEC thereby eliminating the need to pay the LEC transmission charge.[31] Additional central office charges would apply for special central office features provided at the customer's request using equipment such as multiplexers, DACS, or bridges, located in the central office. A customer taking a LEC special access line would pay both of the unbundled rate elements (the connection and the transmission charges) in lieu of the channel termination charges.

41. Rate structure revisions would also be necessary in order to implement physical collocation. As in the case of virtual collocation, a form of connection charge would be necessary to recover the cost of linking the interconnector's facilities in the central office with those of the LEC. Such a charge should be relatively low since it would cover only connections within the central office. We invite interested parties to comment on the application to physical collocation of the two alternative rate structures described above for virtual collocation. Since interconnecting party use of LEC facilities is different in virtual and physical collocation, an unbundled connection charge for physical collocation would cover different costs than an unbundled connection charge for virtual collocation. We ask interested parties commenting on the alternative of unbundled connection and transmission charges to address the proper division of costs between the connection and the transmission charge in the case of physical collocation.

42. Under a physical collocation approach to implementing expanded interconnection, the LEC would also impose space rental charges for the use of central office space as well as vaulting and riser space by interconnecting parties.[32] There appear to be two models for regulatory treatment of the central office space rental -- the use of tariffs or individual contracts. We ask interested parties to address the benefits and drawbacks of both of these options as well as the proper regulatory classification of such offerings under the Communications Act.

43. State plans for expanded interconnection also include an element that is sometimes described as a "contribution" element to be paid to the LEC by interconnecting parties.[33] Such a mechanism could be

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[27] Although we tentatively conclude that changes in the current rate structure for non-recurring charges are not necessary, we ask interested parties to address this issue.

[28] We do not invite further comment on the MFS proposal for a bidding process to determine whether the LEC or the CAP would provide interconnection facilities since we believe that addressing collocation and pricing issues directly is a superior alternative.

[29] In order to retain, under virtual collocation, the benefits of ownership available under physical collocation, interconnecting parties may wish to purchase the central office equipment to be used by the LEC in providing service to the interconnector. In such circumstances, the tariffs for this equipment would typically reflect the terms of individual contracts between the LEC and the interconnecting party rather than a rate for a particular type of equipment available to all interested parties. We ask interested parties to comment on the use of such individual pricing for central office equipment. We also ask interested parties to comment on the rate structure treatment of maintenance costs for central office equipment dedicated to serving interconnecting parties under a virtual collocation approach.

[30] Charges for central office special features would be required to cover central office equipment designated by interconnecting parties.

[31] The interconnecting party would also retain the option of taking special access transmission service from the LEC and reselling it.

[32] This charge would also cover the cost of power, lighting, and other similar support services provided by the LEC in conjunction with central office space.

[33] For example, the Illinois Bell intrastate interconnection tariff, which reflects a virtual collocation approach, contains a contribution charge designed to cover a portion of the overhead costs previously recovered through special access service now

used with either physical or virtual collocation. While the need for a contribution element is unclear, particularly in the context of interstate special access, we invite interested parties to comment on whether such an element is necessary to alleviate any hardships caused by changes resulting from expanded interconnection.[34] In particular, we invite interested parties to discuss whether such a mechanism is necessary to protect customers whose special access rates might increase under a more competitive rate structure. Parties supporting use of such a mechanism should describe in detail the nature and scope of the underlying problems the mechanism is designed to solve.

44. We propose that the LECs be required to implement expanded interconnection for DS1 and DS3 services as soon as possible after adoption of an order in this proceeding, since we believe that the current market demonstrates a clear interest by third parties in expanded interconnection for the provision of these services. In the case of other special access services, we propose to allow the LECs to implement the new rate structure changes for each of the four price cap special access service categories upon receipt of a request for expanded interconnection for the provision of one or more services in the category.[35] We tentatively conclude that this represents a reasonable compromise between requiring immediate implementation for all special access services and allowing service-by-service implementation. [36] The LECs would also have the option of implementing the new rate structure without waiting for interconnection requests.

45. We also believe that we must examine the proper extent of LEC rate structure flexibility in responding to special access competition. Prior Commission decisions may limit the LECs' flexibility in determining the structure of their special access offerings.[37] With the advent of competition, the LECs may need added flexibility to compete for special access traffic. At the same time, we may wish to proscribe certain possible forms of competitive response by the LECs on the ground that they do not represent fair competition. Accordingly, we believe that it may be appropriate to consider whether to establish new guidelines for review of rate structure responses to competition, such as volume discounts, or distance-sensitive pricing of connection charges, channel termination charges, or their equivalents. We also ask for comment on whether quidelines should be developed for review of any LEC proposals to increase channel termination charges for the connection from the customer premise to the end office and to reduce rates for the connection between the LEC end office and the IXC POP or other customer designated termination point.[38] Parties advocating that we develop such guidelines should discuss how their proposals would ensure the LECs adequate flexibility to respond to competition while preventing the possibility of anti-competitive abuses.

46. We ask interested parties to comment on these proposals. In particular, parties should address the benefits and drawbacks of the rate structure alternatives outlined above. We also invite interested parties to address the need for rate structure guidelines to govern the LECs' competitive responses, as well as the extent of flexibility necessary to permit the LECs to respond fairly to competition. Parties should also address whether there is a need for a "contribution" charge or some other mechanism to alleviate any hardships caused by changes resulting from expanded interconnection. Finally, we invite parties to discuss the need for special access rate structure changes in the event of physical collocation.

G. Pricing

1. Price Cap LECs

a. Initial Rate Levels

47. In the *LEC Price Cap Order*, the Commission stated that "[p]ricing issues related to other services that require fundamental changes in the access charge structure will be resolved in appropriate proceedings as they arise." [39] In doing so, the Commission recognized that rates for tariff elements instituted in conjunction with certain very fundamental changes in the existing rate structure might require special scrutiny beyond that already provided for in the price caps structure. We believe that the changes in the current special access rate structure proposed by the

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provided by the CAP. The New York Telephone Company intrastate interconnection tariff, which reflects a physical collocation approach, includes a contribution charge designed to recoup a portion of lost contributions to support other services. These plans may, however, address state ratemaking concerns that do not arise at the federal level.

[34] A contribution charge could also be applied to LEC as well as CAP traffic. While we have not determined whether there is a need for implementation of a "contribution" element in conjunction with expanded interconnection for the provision of interstate special access, we note that MFS has stated that it would be willing to pay such a charge if properly developed by the Commission and applied in a non-discriminatory manner.

[35] The price cap rules divide special access services into the following four categories for purposes of applying price bands: (1) voice grade, WATS, metallic, telegraph; (2) audio and video; (3) high capacity and digital data services; and (4) wideband data and wideband analog. Although this requirement uses service groupings developed for price cap purposes, we propose to apply it to rate of return carriers as well. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6811-6812 (1990) *(LEC Price Cap Order)*, *recon. in part*, 6 FCC Rcd 4 (1991) *(LEC Price Cap Recon. Order)*.

[36] Across-the-board implementation of the new rate structure would require only one tariff filing covering all special access services, but would force the LECs to revise tariffs for services that may not be subject to competitive provision initially. Service-by-service implementation would avoid the need to restructure rates for non-competitive services, but could result in new tariff filings each time parties sought expanded interconnection for a new service.

[37] While our adoption of price cap regulation has supplanted certain of the Commission's previous orders governing, for example, strategic pricing of special access service, price cap regulation does not displace decisions governing rate structure. *LEC Price Cap Order*, 5 FCC Rcd 6786, 6811, 6826 (1990), *recon. in part*, 6 FCC Rcd 4 (1991).

[38] In considering the initial special access filings made in 1983, the Commission found certain special access rates to be unlawfully discriminatory because they appeared to reflect the routing of the special access line. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1099-1103, 1248-1283 (1984). At that time, the LECs did not face competition for provision of the individual segments of interstate special access lines and the routing of such lines was entirely at the LEC's discretion. We ask for comment on these matters in light of competitive developments.

[39] *LEC Price Cap Order*, 5 FCC Rcd 6786, 6835 (1990).

Commission to implement expanded interconnection and remove barriers to competition fall into this very limited category.

48. In particular, we tentatively conclude that the initial charges for rate elements implementing expanded interconnection for the provision of special access should be subject to special scrutiny insofar as they apply to interconnecting parties, many of whom are the LECs' competitors. We also believe that the general level of scrutiny accorded the pricing of rate elements paid by interconnecting parties should be equivalent regardless of whether these initial charges qualify as new or restructured services under the current price cap definitions.

49. The Commission currently has two regulatory structures for evaluating initial rates for new or restructured services, as well as subsequent changes in such rates -- the mechanisms established in the *LEC Price Cap Order* [40] and traditional rate of return regulation for non-price-cap LECs. The Commission's price cap rules, which apply to the larger carriers required to offer expanded interconnection, specifically define new and restructured services and establish separate standards for evaluating each type of service offering. For purposes of the price cap rules, new services are defined as offerings that give customers options in addition to those that were previously available.[41] A set of tariff revisions is deemed to constitute a restructured service when it replaces a prior offering.[42] Thus, under the current rules, it appears that implementing expanded interconnection by adding a new connection charge would result in a new service offering under price caps. Unbundling the channel termination charge, on the other hand, would result in a restructured service since the channel termination charge would be eliminated.[43]

50. Under the Commission's price cap rules, the initial rates contained in tariff revisions deemed to constitute a restructured service offering must be less than or equal to the service basket price cap and satisfy any relevant price band restrictions. [44] Initial rates for new services offered under price cap regulation were originally reviewed only under a net revenue test designed to prevent predatory pricing. On reconsideration, this Commission recently adopted a more stringent interim method for review of the initial rates for new services, which adds a requirement that price cap carriers provide traditional tariff cost support to allow us to ascertain whether new service rates are unreasonably high. In doing so, the Commission stated that it would "return to the issue of new service pricing"[45] in the *Part 69 /ONA* proceeding, which will establish pricing standards for new and restructured ONA services, as well as other new services.

51. In order to allow this proceeding to move forward, however, we will propose principles here to govern the initial pricing of new and restructured service offerings implemented in order to provide expanded interconnection. While certain issues in this proceeding are very similar to those in the *Part 69 /ONA* proceeding, the context in which we address the issues in the two proceedings differs. Despite these differences in context, the development of standards for the pricing of basic service elements in the ONA context and the pricing of new services within the *Part 69* proceeding will provide us with valuable experience which will be helpful in addressing the issues before us in this proceeding.

52. In light of their importance to the development of competition, we tentatively conclude that the initial rates for the new elements to be paid by interconnecting parties should be reviewed not only under the existing price cap rules, but also pursuant to additional standards adopted in this proceeding. The additional tests should result in the same general level of scrutiny regardless of whether the service is designated as new or restructured.[46] Moreover, we invite parties to comment on whether the existing net revenue test will be appropriate for the new connection charge.

53. Accordingly, we tentatively conclude that the price cap LECs should be required to justify the initial rate levels for their connection charges, whether new or restructured services under price caps, describing how they determined the direct costs of providing expanded interconnection service and explaining the overhead loadings used in rate development. We propose to require similar justification of the charges for special central office services provided to interconnecting parties by the LECs. In addition, we propose to require justification of the initial price level of any "contribution" element. We also propose to apply this level of scrutiny, insofar as feasible, to price cap LECs that voluntarily offer expanded interconnection for the provision of interstate special access.

54. We believe that careful scrutiny of the initial rates for the tariff elements to be paid by competitors is necessary to ensure a smooth transition to expanded competition in the provision of interstate special access services. Although price cap standards for rate review generally provide necessary protections, while fostering increased LEC efficiency, we believe that review of initial rates based on costs may remain appropriate in limited cases such as this in which the Commission is proposing fundamental changes in the access structure to remove barriers to basic service competition. At the same time, we invite interested parties to consider options for providing the protections necessary in these circumstances through pricing regulation.

55. We ask interested parties to address our proposals for review of the initial rates for new and restructured services implemented by price cap carriers to accommodate our tentative plan for expanded interconnection opportunities.[47] In particular, parties should discuss the standards for review of connection charges and special

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[40] LEC Price Cap Order, 5 FCC Rcd 6786 (1990), *recon. in part*, 6 FCC Rcd 4 (1991).

[41] *LEC Price Cap Order*, 5 FCC Rcd at 6824-6826.

[42] *Id.*

[43] Use of a contribution charge could also affect whether the tariff revisions implementing expanded interconnection are classified as a new service offering or a restructured service.

[44] *LEC Price Cap Order*, 5 FCC Rcd at 6835.

[45] *LEC Price Cap Recon. Order*, at para. 126-27. The record developed in the *LEC Price Cap* proceeding with respect to the pricing of new services was incorporated into the *Part 69/ONA* proceeding for this purpose.

[46] Under the current rules, it appears that certain of the rate structure options described above would qualify as restructured services, while others would be new services.

[47] We also invite interested parties to address our rationale for singling this type of fundamental rate restructuring out for special scrutiny.

central office charges applicable to interconnecting parties. We ask parties to address the standard for review of the initial rates for the newly competitive LEC access services which are not used substantially by competitors such as the channel termination charge. We also ask interested parties to comment on the development of price cap regulations that could provide the necessary protections, particularly in the case of tariff revisions deemed to constitute a restructured service offering. In addition, we ask interested parties to discuss the costs to be included in any "contribution" charge that might be adopted as part of this proceeding.[48] Finally, commenting parties should address the appropriate standards for reviewing initial rates filed by price cap carriers that implement expanded interconnection on a voluntary basis.

b. Subsequent Tariff Revisions

56. Under the current price cap rules, changes in rate levels are governed by the price cap index applicable to each service basket. In addition, the Commission has adopted a number of service-specific pricing bands or subindexes. In the case of special access, there are separate pricing bands for each of the following service groupings: (1) voice grade, WATS, metallic, telegraph; (2) audio and video; (3) high capacity and digital data services; and (4) wideband data and wideband analog. The Commission also established separate pricing bands for DS1 and DS3 high capacity services.[49] The rules specify that the annual pricing flexibility for these service groups, and for DS1 and DS3 services separately, is limited to an increase or decrease of five percent relative to the percentage change in the price cap index for the special access service basket.

57. We tentatively conclude that, with the implementation of expanded interconnection, additional measures are necessary to govern ongoing changes in special access rates for price cap carriers. In particular, we propose to establish a price ceiling for a separate subindex of the services used by interconnecting parties, *i.e.*, connection charges[50] and special central office service charges.[51] We propose that pricing flexibility for this rate element group be limited to annual increases of two percent relative to the percentage change in the price cap index for the special access service basket. Under this proposal, the connection and special central office service charges would also continue to be included in the four special access service groupings for purposes of applying the banding restrictions applicable to those groupings. We believe that this additional protection is appropriate in light of the importance of these charges to the development of competition in the provision of special access transmission links.

58. We also propose that the price of any "contribution" element that may be adopted should be set at a specified level, and thereafter subject to change only through further order or recalculation pursuant to a prescribed formula.[52] We invite interested parties to address the appropriate treatment of any such contribution element under price cap regulation.

59. Although the LECs have strongly urged the Commission to allow them greater pricing flexibility in conjunction with expanded interconnection and access competition, we do not propose to change the rate bands applicable to their DS1 or DS3 offerings at this time. We believe that the existing option of reducing rates for these services pursuant to an average variable cost showing to protect against predatory pricing already permits substantial flexibility. We propose to monitor competitive developments carefully, however, to determine whether additional LEC pricing flexibility is appropriate.

60. We ask interested parties to address our proposals for review of on-going changes in special access rates. In particular, we ask commenting parties to address the need for a separate subindex for the connection charge and the special central office service charges paid by interconnecting parties, and comment on the appropriate breadth of the pricing band. We also ask interested parties to address the appropriate treatment of a possible contribution element. We also invite commenting parties to discuss whether the LECs should be accorded additional pricing flexibility for DS1 and DS3 services at some time in the future. Finally, we ask interested parties to address the appropriate standards for review of price changes by price cap LECs that voluntarily offer expanded interconnection.

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[48] For example, should the Commission develop a formula for calculating the costs eligible for recovery through such a charge?

[49] *LEC Price Cap Order*, 5 FCC Rcd at 6811-6812.

[50] Connection charges would be included in this group even if we restructure the current channel termination charge so that interconnectors and other LEC customers would all pay connection charges.

[51] In order to retain the tax and other benefits of ownership under physical collocation, interconnecting parties utilizing a virtual collocation arrangement may wish to purchase central office equipment to be used by the LEC in providing service to the interconnector. In such circumstances, the LEC charges paid by the interconnector would reflect the terms of an underlying contract between the LEC and the interconnector. Assuming that such arrangements are permitted, it may be appropriate to treat ongoing changes in the LEC rates for such equipment pursuant to different standards than the connection charges since changes in the equipment rates could reflect changes in the terms of the underlying contracts. We invite interested parties to comment on the proper standards for review of such charges in the case of price cap carriers. We also ask interested parties to comment on any related questions concerning maintenance of such central office equipment.

[52] If the Commission were to adopt a "contribution" element, we believe that setting the level of that charge through Commission orders or a prescribed formula, rather than the price cap mechanism, would be appropriate. For example, under price caps, the revenue requirement for high cost assistance continues to be determined by the formula prescribed in the Part 36 separations procedures.

2. Rate of Return LECs

61. The pricing of rate elements instituted by rate of return LECs in order to implement expanded interconnection for the provision of special access services are subject to somewhat different standards of review from those applicable to LECs operating pursuant to price cap regulation. While the proposed standards for review of price cap LECs' initial rates are very similar to those applicable to rate of return carriers, the review of subsequent tariff revisions would differ significantly.

62. The Commission's Part 69 rules do not specify a particular rate structure for special access services or allocate costs below the service category level.[53] These offerings, however, must comply with the general standards for just, reasonable, and non-discriminatory rates, terms and conditions contained in the Communications Act as well as the specific requirements in Section 61.38 of the Commission's rules.[54] Application of these general standards to the provision of special access service is also discussed in a number of access tariff review orders.[55]

63. We ask interested parties to comment on the proper standards for review of the initial prices and subsequent price changes for the rate elements implementing expanded interconnection offered by rate of return LECs.

H. Other Issues

64. We tentatively conclude that increased competition in the provision of interstate special access services will not have significant undesirable collateral effects, despite the arguments of certain parties commenting on the MFS Petition. In particular, these parties express concern that expanded access competition could increase intrastate cost allocations, result in higher rates for other LEC services, and interfere with intrastate policies concerning access competition.

65. We do not believe that authorizing expanded interconnection for interstate special access will have adverse separations effects on the states. Special access costs are assigned directly to either the federal or state jurisdiction. If a special access line is used exclusively for intrastate services or if interstate traffic on the line represents ten percent or less of the total traffic, the costs of the special access line will be assigned to the state jurisdiction.[56] Such lines are also purchased out of the state tariffs. Expanded interstate special access competition may reduce the relative interstate traffic on some special access lines, particularly in states which do not permit intrastate competition. This could result in the reassignment of some special access lines to the state jurisdiction. These reassignments should not have adverse consequences, however, since when the cost of a special access line is reassigned to the state jurisdiction, the associated revenues would also be treated as intrastate. The costs and revenues shifted to the state jurisdiction should be comparable, although the exact effects, of course, depend upon the relationship of state special access costs and revenues. Absent an imbalance in this regard, state per unit special access rates should not increase.

66. Nor do we anticipate that expanded special access competition will have an adverse effect on rates for other LEC services. Extensive diversion of special access traffic from the LEC networks could put upward pressure on charges for other LEC services in certain circumstances. There is no reason to assume that such diversion will occur, however. For example, special access traffic lost due to expanded competition should be offset, at least in part, by overall traffic growth. LEC efficiency gains spurred by increased competition should also tend to reduce per unit costs.[57] We also note that adjustments such as a contribution element could be used, if necessary, to ensure that expanded special access competition does not have a significant adverse effect.

67. NARUC and several state commissions also expressed concern that expanded interstate access competition would effectively deprive them of authority over the development of intrastate access competition. Regulation of interstate access competition is clearly within the scope of the Commission's regulatory mandate. At the same time, we recognize that interstate policies on access competition may influence the development of access competition at the state level to some extent, as have other pro-competitive federal policies. Concomitantly, state decisions concerning these issues will undoubtedly affect the development of federal policy.

68. We invite interested persons to comment on the issues discussed above, including any potential for expanded interstate special access competition to have adverse collateral effects on the separation of LEC costs, and rates for other services. We also seek comment on the potential effect of federal policies in this area on state regulation.

I. Legal Authority

69. We believe that the Commission has ample authority to implement the proposals contained in this Notice. Section 201 of the Communications Act, 47 U.S.C. 201, specifies that it is the duty of all common carriers to provide service upon reasonable request and authorizes the Commission to order interconnection if the Commission finds it necessary or desirable in the public interest. Section 201 also requires that the carriers' terms and conditions for the provision of communications services be just and reasonable. The statute thus gives us considerable authority to adopt interconnection policies and requirements. Sections 201, 202, 203, 204 and 205, 47 U.S.C. 201, 202, 203, 204 & 205, also provide the Commission with authority to adopt the rate structure and rate level proposals contained in this notice.[58] Any parties

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[53] 47 C.F.R. § 69.114.

[54] 47 U.S.C. § § 201 and 202; 47 C.F.R. § 61.38.

[55] *See, e.g.*, Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, 5 FCC Rcd 400, 406-08 (1990); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1099-1103, 1248-1283 (1984); Investigation of Access and Diverstiture Related Tariffs, CC Docket No. 83-1145, FCC 84-524, released Nov. 9, 1984, 49 F.R. 50457 (Dec. 28, 1984); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Mimeo No. 2647, released Feb. 19, 1985, 50 F.R. 1263 (March 29, 1985).

[56] MTS and WATS Market Structure and Amendment of Part 36, CC Docket Nos. 78-72 & 80-286, 4 FCC Rcd 5660 (1989).

[57] The LECs' ability to change prices is also subject to a variety of regulatory constraints.

[58] In light of the compensation proposed for LEC provision of expanded interconnection offerings, we do not believe that our

questioning the Commission's legal authority to adopt the proposals described in this notice given an appropriate record should address these issues in their comments.

III. SWITCHED TRANSPORT NOTICE OF INQUIRY

A. Background

70. As the second step in our initiative to remove barriers to entry, thereby fostering the development of competition in the provision of interstate access facilities and services, we institute a notice of inquiry concerning the competitive provision of interstate switched transport service. This will allow us to gather additional information before determining whether to proceed with a proposal for expanded interconnection to permit the competitive provision of interstate switched transport service. We believe that this represents a cautious measured and reasonable approach in light of the differences between interstate special access and switched transport service.

71. The potential benefits of competition in the provision of transport are greater than in the case of special access. The 1990 Tier 1 LEC net revenues from interstate switched transport are approximately $4.1 billion as compared to about $2.6 billion for special access. The potential benefits from improved LEC efficiency, expanded customer choice, and more rapid deployment of new technology in the provision of switched transport are substantial.

72. At the same time, the issues associated with increased competition in the provision of switched transport service appear more complex than in the case of special access. For example, there are significant questions regarding the compatibility of the existing switched transport rate structure with a competitive market in which competitors would be free to price as they chose. The current LEC rate structure for the provision of switched transport reflects equal charges per unit of traffic for all IXCs. Competing CAPs would be likely to offer switched transport service using a flat charge per circuit since such an offering would tend to be more attractive than the current per minute charges to the larger IXCs on high volume routes. Responsive rate changes by the LECs could, however, result in upward pressure on the switched transport rates paid by smaller IXCs and the rates for service on low volume routes. Thus, we have chosen to proceed in a cautious fashion, seeking additional comment before deciding whether to proceed with a proposal for expanded interconnection to permit competition in the provision of interstate switched transport.

B. Architecture and Related Issues

73. In addressing the issues we identify below, interested parties should assume that the technical interconnection arrangements will be similar to those for special access. Additionally, they should assume that the entities who can avail themselves of expanded interconnection and the LECs that will be required to provide such interconnection will parallel that for special access. Parties believing that one or more of these requirements would be undesirable for switched transport, should identify and explain the factors they believe indicate that other requirements should be utilized in the case of interstate transport.

C. Rate Structure and Pricing

74. The most significant rate structure and pricing issues for switched transport appear to involve the dedicated transport links between the LEC end office or tandem switch and the IXC POP. The LECs currently charge an equal amount per unit of traffic forswitched transport.[59] If expanded interconnection rights were to be adopted for switched transport, CAPs presumably would charge a cost-based flat rate that could be more attractive to high-volume interstate access users than usage-based LEC switched transport. Therefore, absent some recognition of the competitive environment in transport pricing, a portion of LEC switched transport traffic would appear to be at risk, creating the potential for upward pressure on LEC per-unit costs.[60] The degree to which this would happen depends on how much traffic customers, particularly the IXCs, shift to CAP services or their own facilities, the configuration of the access network (which affects the potential alternative customers for that transmission capacity), and the growth rate of traffic in the LEC service area. Thus, consideration of possible LEC responses to CAP flat rate pricing of switched transport appears to be appropriate if expanded switched transport interconnections are to be permitted. Interested parties are asked to address these issues.

75. Any pricing changes in interstate switched transport that may result if we proceed with expanded transport interconnection will primarily affect end users indirectly, through IXC rates for switched services. Interested parties are invited to address the possible effects of expanded interstate switched transport interconnection on end users.

76. Finally, questions have been raised as to whether interconnecting parties should pay a "contribution" charge to avoid upward pressure on rates for less competitive transport routes or the rates for other services. MFS has recognized the possible need for such a charge and stated that it would not object if the amount were properly determined by the Commission and the charge applied in a nondiscriminatory manner. For instance, a contribution element assessed on all users of switched

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interconnection proposals raise questions of a taking without just compensation as certain parties commenting on the MFS petition argued.

[59] This pricing methodology derives from an MFJ requirement that the BOCs employ such a pricing mechanism for switched transport until September 1, 1991. The Commission waived the switched transport rules to permit this pricing approach to be utilized by all LECs. We recently received comment on issues involving the pricing of switched transport that are related to the expiration of the MFJ's equal charge per unit of traffic requirement on August 31, 1991. We are currently examining the proper pricing of transport after the MFJ requirement expires. We also anticipate that the record concerning transport pricing will be useful in our consideration of some of the issues raised by expanded interconnection for switched transport.

[60] In this regard, we note that a relatively small portion of LEC switched transport trunks appear to carry a high proportion of their total transport traffic.

transport interconnections (including LEC use of such interconnections) might assist in establishing a more cost-based flat rate dedicated transport charge that permits the introduction of competition, while maintaining an acceptable usage sensitive common transport rate. We invite interested persons to comment on the need for a contribution element and the appropriate structure for any such charge that might be developed.

D. Universal Service, Jurisdictional, and Subsidy Issues

77. Several commenters on the MFS petition, including NARUC and some state commissions, expressed concern that expanded interstate switched transport competition would have an adverse effect on universal service by shifting costs to the state jurisdictions through the separations process. They argue that this could occur, for example, if intrastate switched transport competition was not authorized. The diversion of some interstate transport traffic from the LEC while intrastate transport traffic remained unaffected would increase the relative proportion of intrastate transport traffic and increase the intrastate cost assignment since these costs are generally separated between the federal and state jurisdictions on a relative use basis. Several state commissions also argue that jurisdictional arbitrage will be a problem because an inability to distinguish interstate and intrastate traffic in certain instances could affect the states' ability to enforce their regulations.

78. Several states also express policy reservations about interstate access competition, which, they assert, will disturb the balance reflected in the access charge structure. NARUC and several state commissions, among others, contend that the current access charge structure includes subsidies and other non-cost components designed to achieve public interest objectives, such as universal service and assure low basic service rates. They emphasize that as large customers, including IXCs, leave LEC access services for CAPs in low-cost areas where the LECs must charge above-cost averaged rates, the resulting revenue losses will reduce or perhaps eliminate the "contributions" that these services provide to reduce rates for basic services in high-cost areas. These states express concern that interstate access service competition could cause basic service rates to increase.

79. The precise effect of interstate switched transport competition on these areas of state concern is unclear. The effect will be determined by several factors, including the extent of expanded interconnection rights authorized at both the federal and state level, state and federal pricing policies that affect the ability of the LECs to compete with the CAPs, the overall growth rate for LEC interstate access traffic and the extent to which such growth offsets traffic losses to the CAPs, and the extent of LEC efficiency gains due to the increased pressure of competition and the incentives of price cap regulation. We invite interested persons to comment on these subjects. We specifically seek comment on the areas in which subsidies are perceived to exist, the magnitude of such subsidies, and the potential effect of increased access competition on these subsidies. We also urge commenting parties to provide specific detail on the interconnecting configurations anticipated if interstate transport interconnection is expanded and any measurement issues that these interconnecting arrangements would present.

IV. PROCEDURAL MATTERS

A. *Ex Parte*

80. This is a non-restricted notice and comment rulemaking. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission's rules. *See generally*, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

B. Regulatory Flexibility Act

81. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate transmission lines for telecommunications services directly subject to the proposed rule amendment are large corporations or affiliates of such corporations. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

C. Notice and Comment Provision

82. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before August 6, 1991, and reply comments on or before September 5, 1991. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information regarding this Notice of Proposed Rulemaking and Notice of Inquiry, contact Douglas Slotten, Common Carrier Bureau, Policy and Program Planning Division, (202) 632-9342.

V. ORDERING CLAUSE

83. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes in interconnection for the provision interstate special access described above, and that COMMENT IS INVITED on these proposals.

84. IT IS FURTHER ORDERED that a NOTICE OF INQUIRY is instituted concerning the regulatory changes in interconnection for the provision of interstate switched transport described above, and that COMMENT IS INVITED on these proposals.[61]

85. IT IS FURTHER ORDERED that the Petition for Rulemaking filed by MFS IS GRANTED to the extent indicated herein. The Petition for Declaratory Ruling filed by Teleport IS ALSO GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments in Response to Metropolitan Fiber System's Petition for Rulemaking - RM 7249 Filed April 4, 1990

Ad Hoc Telecommunications Users Committee

Alabama Public Service Commission

American Petroleum Institute

Ameritech Operating Companies

Ameritech States

Arkansas Public Service Commission

Associated Communications Corporation

Association for Local Telecommunications Services

Bell Atlantic Telephone Companies

BellSouth Telephone Companies

People of the State of California and the Public Utilities Commission of the State of California

Central Telephone Company

Cincinnati Bell Telephone Company

Committee of Corporate Telecommunications Users

Competitive Telecommunications Association

Contel Corporation

CyberTel Corporation and Cellular Information Systems, Inc.

Public Service Commission of the District of Columbia

Florida Public Service Commission

FMR Corp.

General Communication, Inc.

Georgia Public Service Commission

GTE Service Corporation

Local Area Telecommunications, Inc.

MCI Telecommunications Corporation

MessagePhone, Inc.

Metropolitan Fiber Systems, Inc.

National Association of Regulatory Utility Commissioners

National Telephone Cooperative Association

New York Telephone Company and New England Telephone and Telegraph Company

Organization for the Protection and Advancement of Small Telephone Companies

Pacific Bell and Nevada Bell

Rochester Telephone Corporation

Southern New England Telephone Company

Southwestern Bell Telephone Company

Taconic Telephone Corp.

Telephone and Data Systems, Inc.

Teleport Communications Group

United Telephone System Companies

US West Communications

Utilities Telecommunications Council

Williams Telecommunications Group, Inc.

Reply Comments Filed May 29, 1990

Ad Hoc Telecommunications Users Committee

American Petroleum Institute

Ameritech Operating Companies

Association for Local Telecommunications Services

Association of Data Communications Users, California Bankers Clearing House Association, Mastercard International Incorporated, New York Clearing House Association, Visa U.S.A., Inc.

BellSouth Telephone Companies

Bell Atlantic Telephone Companies

People of the State of California, Public Utilities Commission of the State of California

Committee of Corporate Telecommunications Users

Communications Transmission, Inc.

Communications Workers of America, District 6

Competitive Telecommunications Association

Contel Corporation

FMR Corp.

General Communication, Inc.

[61] These actions are taken pursuant to Sections 1, 4(i) and (j), 201-205, 218, 220, and 403 of the Communications Act as amended, 47 U.S.C. § § 151, 154(i) & (j), 201-205, 218, 220, and 403.

GTE Service Corporation

Local Area Telecommunications, Inc.

MCI Telecommunications Corporation

The Public Service Commission of Maryland

MessagePhone, Inc.

Metropolitan Fiber Systems, Inc.

National Association of Regulatory Utility Commissioners

NYNEX Telephone Companies

Pacific Bell and Nevada Bell

Rochester Telephone Corporation

Southwestern Bell Telephone Company

Taconic Telephone Corp., Fort Bend Telephone Company

Teleport Communications Group - Motion to Accept Late-Filed Reply

Public Utility Commission of Texas - Motion to Accept Late-Filed Reply

U S West Communications

United States Telephone Association

United Telecommunications, Inc.

Williams Telecommunications Group, Inc.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Expanded Interconnection With Local Telephone Company Facilities, CC Docket No. 91-141 (RM-7249).

I support the NPRM/NOI that we are initiating on expanded interconnection. Competition at the local exchange level is an idea whose time is coming, hastened by technology and consumer demand. This initial proposal, limited to requiring interconnection for competitive special access services, is measured and judicious.

History suggests, however, that modest proposals often turn out to have far-reaching and sometimes unintended consequences. We would do well, then, to reflect upon some issues that may arise from our decision to order expanded interconnection, if that comes to pass. [1]

The oldtimers among us--- among whom I cannot count myself--- must have a sense of *deja vu*, for the parallels here to the beginnings of long-distance competition are striking.

We hear warnings of "cream-skimming," for example: objections that allowing local exchange competition will tempt competitors to siphon off high-volume customers, leaving lower-volume customers, who produce less revenue, to bear the costs of network operations. Hearing such charges, it's encouraging to remember that in the long-distance market this specter of cream skimming turned out to be overdrawn. But even as we hope that history will repeat itself, we should remember that keeping local and long-distance rates affordable required considerable exertions on the part of regulators. The demand growth that helped keep rates low, for example, was stimulated in part by the adoption of subscriber line charges. If we hope to see events unfold in the same encouraging way as we move toward competition in the local access market, we must not expect an automatic reenactment of previous history; regulators will have to work hard to preserve reasonably-priced, universally affordable telephone service. [2]

Perhaps we will be able to learn something from the history of emerging competition in other markets--- telephone equipment, long-distance and enhanced services, for example. In the past, the advent of competition required us to adopt new rules governing interconnection, to amend our jurisdictional separations rules and to adopt access charge rules. I hope that commenters will tell us how we might build upon, borrow from or change the approaches we have followed in other areas.

On some issues that will confront us, we can't look so easily for guidance from experience. It seems inevitable that if local telephone company special access facilities are supplanted by new entities, telephone companies will feel compelled to change the current special access rate structure, which is now generally averaged. Local telephone companies may respond to competition by filing tariffs to lower their rates on more competitive routes while raising them on less competitive routes. In any event, our current regulatory practice--- to allow "competitive" rates for new entrants, while requiring averaged rates for existing carriers' services--- will probably prove unsustainable in the long run.

If we allow expanded interconnection along the lines we have proposed, we must also face some fundamental questions about rate structure and rate levels for special access service, and about the need for and scope of local telephone company pricing flexibility. We must also recognize that local competition--- and local telephone company responses to competition--- may give customers

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[1] The Commission, we should note, has used its powers to compel or prescribe interconnection only when the public interest requires.

[2] Although I acknowledge that our proposal is limited to special access, our experience (with MCI's Execunet Service, for example) suggests that once facilities are in place, traffic will be diverted to them--- and often in unexpected ways. The introduction of local exchange competition will highlight any instability in access rates. As one commentator concluded in a different context in 1986:

> There is widespread recognition that the existing accesss plan is unstable, and that it reduces long distance calling below the economic level, encourages the substitution of private line access for switched access even when switched access is cheaper to provide, and creates an incentive for construction of expensive private facilities to provide capacity that could be provided more cheaply over local exchange company facilities.

See Gerald W. Brock, Telephone Pricing to Promote Universal Service and Economic Freedom, at 58 (OPP Working Paper Series, No. 18, January 1986).

greater incentives to migrate switched traffic to special access facilities--- either the local telephone companies' facilities or those of competitors.

The rate structures we propose here will benefit customers who interconnect within one-eighth of a mile of the central office. I hope commenters will address whether this benefit comports with the public interest. In the past, the Commission--- hoping to encourage reasonably-priced service to all customers within a carrier's service area--- generally was reluctant to endorse special access tariffs which conferred benefits solely on the basis of proximity to the central office. If we depart from this policy, we should do so with our eyes open to the possible impact upon the rates of other special access customers.

Finally, I hope that the comments we receive will discuss the implications of our proposal to require interconnection for special access on competition for switched access traffic--- even though I'm fully aware that we do not now propose to require expanded interconnection for switched access. The implications of introducing competition into the market for switched access are probably greater than they are for the special access market. And while the specific implications for each may differ, we face the same formidable task in both: to balance the proven benefits of competition against the potential harm to local carriers and, most important, their customers.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-140

In re

Revision of
Radio Rules and Policies

NOTICE OF PROPOSED RULE MAKING

Adopted: May 9, 1991; Released: May 30, 1991

Comment Date: August 5, 1991
Reply Comment Date: September 5, 1991

By the Commission: Chairman Sikes issuing a separate statement; Commissioner Quello approving in the overall result, concurring in part and issuing a separate statement; Commissioners Barrett and Duggan issuing separate statements.

I. INTRODUCTION

1. In initiating this proceeding, our goal is to explore changes in the structural and ownership regulations governing radio broadcasting, with a view toward ensuring that the aural services can continue to compete in the communications marketplace and provide service to the public. In recent years, the diversity of information and sources of information in the communications industry has increased substantially. Numerous outlets of communication in addition to broadcast radio are currently available, including television, cable, wireless cable, [1] low power television, motion pictures, video and audio cassette recordings, and print material. [2] In addition, direct broadcast satellite (DBS) audio and video services are on the horizon. This multitude of sources provides consumers with an unprecedented variety of choices and requires radio broadcasters to program ever more astutely to meet the needs and interests of the public and, in turn, to attract advertisers, who are also able to choose from an unprecedented variety of media to reach the public. As a result, radio service to the public has been diminished in some instances as stations fall silent, in part, it appears, because they have been constrained by regulation from adapting to quickly changing market realities.

2. These changes have particularly affected AM radio. Commission records indicate that 197 AM stations are currently dark, as compared with 30 FM stations. While MM Docket No. 87-267 was initiated to improve the technical quality of AM service, it does not address the non-technical economic pressures currently faced by AM broadcasters. Moreover, industry representatives submit that AM radio, in particular daytime only AM radio, is, on the average, unprofitable. [3] FM stations, as a whole, have not experienced the same degree of decline as AM stations, but both AM and FM broadcasters must contend with dramatic changes in the radio industry, as well as increasingly challenging competition from new aural services. For example, the activation of the Docket 80-90 allotments [4] will increase the number of FM radio stations by almost 700, thereby significantly increasing intra-service competition. Moreover, other significant changes affecting all radio service will result from the expansion of the AM band proposed in MM Docket No. 87-267. [5] In addition, new radio services pose a competitive challenge to broadcast radio. Digital audio is already being introduced through satellite to cable TV delivery systems, and other types of digital broadcast radio, such as Broadcast Satellite Sound Service, are on the horizon. Similarly, home satellite dish owners now have the ability to receive a large number of radio services from many different parts of the country. [6] Moreover, growth in the video

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[1] The term "wireless cable" refers here to certain uses of frequencies in the Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Private Operational-Fixed Microwave Service and the Instructional Television Fixed Service. Use of this term here is not intended to suggest that these services constitute cable service for any statutory or regulatory purpose. *See Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (paras. 2, 3) (1990), *pet. for recon. pending.*

[2] In 1984, cable television was available to approximately 70 percent of the United States; in 1989, cable was available to approximately 90 percent of the United States. *See Report* in MM Docket No. 89-600, 5 FCC Rcd 4962, 4966 (1990) *(Cable Report)* . Home satellite dish use has grown from approximately 900, 000 units in use in 1984 to 2.8 million units in use today. *See id.* at 5016. In 1986, 30 percent of television households owned video cassette recorders; in 1990, VCR penetration reached 72 percent. *See id.* at 5019. Wireless cable currently serves approximately 300, 000 subscribers and is expected to increase as a result of rule changes adopted in Gen. Docket 90-54. *See id.* at 5014; *Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990), *pet. for recon. pending; Further Notice of Proposed Rule Making* in Gen. Docket No. 90-54, 5 FCC Rcd 6472 (1990).

[3] The National Association of Broadcasters (NAB) submits that the average profit margin for daytime AM stations in 1989 was negative 5.4 percent, as compared with 5.1 percent for FM stations and 3.9 percent for AM/FM stations. Comments of NAB in Gen. Docket No. 90-357, at 15-16 (filed Nov. 13, 1990) (citing *1990 NAB/BCFM Radio Financial Report*, National Association of Broadcasters, Washington, D.C.). *See also Report on the Status of the AM Broadcast Rules*, RM-5532 (Mass Media Bureau, April 3, 1986).

[4] *Report and Order* in BC Docket No. 80-90, 53 RR 2d 1550 (1983). In Docket 80-90, the Commission modified its technical rules to make possible more intensive use of the FM spectrum. Subsequently, in MM Docket No. 84-231, the Commission allotted approximately 700 new FM channels as a result of the technical rule changes of Docket 80-90. *See Second Report and Order* in MM Docket No. 84-231, 101 FCC 2d 638 (1985). In addition to channels allotted in Docket 84-231, Docket 80-90 made possible a large number of new allotments and station upgrades. Many of these new stations have not yet commenced operation, but are likely to do so within the next several years.

[5] *See Notice of Proposed Rule Making* in MM Docket No. 87-267, 5 FCC Rcd 4381 (1990) *(AM Notice)* .

[6] For example, the January 1991 issue of *Satellite Orbit* lists more than 80 radio stations and services available to dish owners.

market will continue to affect the audio marketplace; the number of video outlets, both broadcast and non-broadcast, has increased in recent years and may soon increase even further, depending on the success of DBS.

3. To enable broadcast radio in general, and AM radio in particular, to have the potential to prosper in the environment of these considerable competitive challenges, we propose modifying our ownership rules to permit a larger assemblage of stations by individual owners. The Commission has historically encouraged ownership diversity and economic competition to achieve fundamental Communications Act objectives -- assuring service to the public and diversity of choice in the marketplace of ideas. It also has recognized, however, that tension may arise between ownership diversity and economic efficiency, and that "[t]he multiple ownership of broadcast stations. .. play[s] an important role in our nation-wide broadcast system, " and diversity goals must therefore be balanced with the need to foster economic growth in order to provide for vigorous competition. [7]

4. In establishing the current national ownership limitation in 1984, the Commission noted that group ownership may lead to economies of scale, particularly given group owners' ability to consolidate management, bookkeeping, secretarial, sales and programming personnel for a number of stations, and to engage in group advertising sales and group program development and purchases.[8] The Commission concluded at that time that group ownership may "foster news gathering, editorializing and public affairs programming," and may lead to the development of independent programming networks.[9] These economies of scale provide broadcasters with greater financial resources, which can be used to meet the needs and tastes of the public more effectively. Such benefits ultimately redound to the public by increasing the responsiveness, quality and diversity of programming. The continual increase in group ownership of radio stations is proposition.[10] We also note the development of strong public broadcasting networks in some areas *(e.g.,* Minnesota, Florida, Oregon), due at least in part, we believe, to the absence of ownership restrictions on public radio and television stations. We continue to be motivated by this belief, and commenters' observations regarding this proposition, including specific examples, are welcome.

5. In addition, greatly divided ownership may weaken local radio station operations in their interactions with other participants in the market and in particular with networks or other centralized providers of programming, so that local participation in the broadcasting process is weakened rather than strengthened. Wide dispersion of ownership, far beyond that mandated by antitrust principles, may, in pursuit of the important values associated with increased competition and diversity of viewpoint, ultimately undermine the overall viability and competitiveness of radio service. Maximizing competition may provide many voices, but each might maintain such a minute fraction of the audience that it would lack an economic base sufficient to effectively serve the needs of the public. On a local level, we believe that stations separately owned will each tend to strive for the same core audience with roughly the same type of programming, while the same stations managed in common may have greater incentives to appeal separately to distinct segments of the audience with distinct programming. In other words, stations managed in common can effectively counterprogram each other. Therefore, we believe that increased group ownership need not necessarily decrease diversity of programming and, to the contrary, may encourage it; the Commission has noted that "it is indeed possible to have greater viewpoint diversity than there is ownership diversity." [11] Although developments associated with cable television provide some support for this principle, [12] the Commission's traditional public interest concerns for diversity of ownership and diversity of viewpoint, together with the abundance of applicants for a limited number of station licenses, have prevented this theory regarding overall programming diversity from being tested in the radio marketplace.

6. Accordingly, we present a number of options for modification of the current rules regarding common ownership of radio stations and our present policy "regarding joint ventures among stations that are not commonly owned.[13] Commenters are requested to discuss whether the current ownership limitations have unduly stagnated

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[7] *Memorandum Opinion and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 74, 81 (1985) *(Ownership Reconsideration Order)* (citing *Report and Order* in Docket No. 10822, 43 FCC 2797, 2801-02 (1954)).

[8] *Report and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 17, 45 (1984) *(Ownership Report and Order) , on reconsideration, Ownership Reconsideration Order, appeal dismissed sub nom. National Association of Black Owned Broadcasters v. FCC,* No. 85-1139 (D.C. Cir. Jan. 4, 1991). In addition, the *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989), dealing with radio-television combinations, illustrates economies of scale and other efficiencies that can be achieved via group ownership in general. For example, the *Order* refers to evidence that existing group-owned stations spend a larger percentage of their budgets on news and overall programming and appear to air more informational programming than stations that are not group-owned. *Id.* at 1748-1749. The *Order* also cites other potential service benefits such as enabling marginal stations to stay on the air, the activation of unused channels or improvement of the facilities of existing stations. *Id.* at 1749-1750.

[9] *Id.* at 44-45.

[10] From 1985 through 1990, the number of group owners of radio stations rose from 423 to 536, increasing every year but one (1986-1987) during that period. Similarly, the number of stations held by group owners rose from 2, 318 to 3, 261 from 1985 through 1990, increasing every year but one (1986-1987).

[11] *Ownership Report and Order* at 34.

[12] The *Cable Report, supra,* note 2, notes that horizontal concentration and vertical integration have contributed to "a wealth of new viewing options for consumers" due to the availability of economies of scale. *Cable Report* at 5009. The *Report* also submits that investment by multiple system operators has enabled several programming services to remain operational, and observes that horizontal concentration and vertical integration can promote the introduction of new services by enabling operators to share information with producers regarding consumer preferences. *id.*

[13] In order to fully understand the impact of this proceeding and future proceedings on new entrants and small businesses, we also expect to form an Advisory Committee on Small Business, which may in turn lead to other specific mechanisms to provide information and interface with small businesses. We will also hold a conference on entrepreneurial communications opportunities later this year. Although this initiative has been announced in this broadcast docket, our focus in these efforts is much broader; we also need to examine the effects of our

or inhibited the radio industry by preventing some owners from purchasing new stations. Commenters are also invited to suggest both ways and reasons other than those mentioned herein to strengthen radio broadcasting in anticipation of further change in the communications marketplace, including specifically the anticipated arrival of digital audio broadcasting. By exploring these matters, we do not intend to artificially re-energize any service that is not valued or used by the public, nor do we intend to shield radio from competition with other media. Rather, the proposals presented below are designed to ensure that regulation is not a contributing factor in the demise of radio service. We seek comment on our general evaluation of the situation currently faced by radio broadcasters, specifically, whether radio service (or AM in particular) is foundering as we perceive and, if so, whether our proposed rule changes (or any changes) are useful or appropriate.

7. Throughout these deliberations we will remain attentive to the impact of the proposals herein on minority ownership, and on how any or all of the following options could be modified to encourage it. In implementing our national minority ownership rule over the past six years, we have seen the emergence of minority-owned station groups. We desire to continue fostering such development through more flexible national minority ownership rules. In this regard, four minority organizations filed a petition for rule making proposing that the present minority ownership limitation of 14 AM and 14 FM stations be increased to 20 AM and 20 FM stations.[14] We seek specific comment on that proposal. How will the other changes proposed in this *Notice* affect the potential for growth in minority ownership? Would the affirmative effects of the current rule be undermined? If the general limitation is increased above the current 12 AM and 12 FM station cap, is there an appropriate separate minority limitation? Should minority owners be permitted to own an unlimited number of stations, or be exempt from any non-numerical limits? It is not the Commission's intent in considering these proposals to impose further impediments to increased minority ownership of broadcast properties. Therefore, commenters are asked to address the issue of whether the changes proposed in this item would have an unintended adverse effect on the ability of minorities to acquire a first or subsequent radio station.

II. THE "12-12-12" NATIONAL OWNERSHIP LIMITATION

8. From the inception of radio regulation in the 1920s and through 1940, no formal limit was placed on the number of stations that one person or entity could own. When the Commission adopted rules governing the new commercial FM service in 1940, it imposed a six-station maximum for that service "[t]o obviate possible monopoly and encourage local initiative." [15] Six years later, the Commission established a *de facto* seven-station limit for the AM service by denying an application filed by CBS to purchase an eighth AM station. [16] In 1953, the Commission formally adopted a seven-station limit for each service. [17]

9. In 1984, the Commission, noting studies that found the radio marketplace remarkably unconcentrated, modified the ownership limitation by permitting a single broadcasting group to own, directly or indirectly, up to 12 AM and 12 FM stations. [18] *See* 47 C.F.R. § 73.3555(d). These rules originally carried a sunset provision under which the ownership restrictions would have been eliminated after six years. [19] Upon reconsideration, the Commission rescinded the sunset provision, stating, "[w]e continue to believe that it is appropriate to proceed cautiously in relaxing rules that affect such a vital aspect of the broadcasting industry." [20] The Commission also established a broader limit that permits group owners to own up to 14 stations if at least two of the stations in which they hold attributable interests are minority-controlled. [21] Six years have passed since the Commission adopted the current national ownership rules. Although we continue to believe that caution is warranted in this area, developments over the past six years make this an apt point at which to re-examine the rules and the radio marketplace.

10. Based upon our evaluation of the national multiple ownership rules, it now appears that further modification is appropriate. Accordingly, we seek comment on a variety of options for relaxing the multiple ownership rules on the alternative bases of number of stations, audience reach or size, or market ranking. The numerically based alternatives discussed below would relax the current national ownership restrictions but retain a set numerical limitation as a precaution to ensure that diversity and competition are maintained. The audience-based options discussed below would incorporate a numerical element but focus on the audience reach and market position of a group owner's stations rather than the number of stations the group owns. These options should serve the Commis-

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actions and provide information to small businesses with respect to telecommunications, private radio and other new technologies.

[14] *See* Petition for Rule Making of the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition and the National Black Media Coalition, at 19-22 (filed Sept. 18, 1990) *(Minority Ownership Petition)* . That pleading also seeks modification of other rules and procedures regarding station transfer and the comparative hearing process designed to enhance minority ownership. We hereby incorporate into this proceeding that portion of the petitioners' pleading concerning revision of the multiple ownership rules. The other issues will be considered in a separate proceeding or proceedings.

[15] Federal Communications Commission, *Sixth Annual Report/Fiscal Year 1940*, at 68.

[16] *Sherwood B. Brunton*, 11 FCC 407 (1946).

[17] *Report and Order* in Docket 8967, 18 FCC 288 (1953). For a detailed discussion of the history of broadcast ownership restrictions, see *Notice of Proposed Rule Making* in Gen. Docket No. 83-1009, 95 FCC 2d 360 (1983).

[18] *Ownership Report and Order* at 18, 42-43 (1984). The *Ownership Report and Order* also raises the national ownership limit for television stations.

[19] *Ownership Report and Order* at 18.

[20] *Ownership Reconsideration Order* at 96.

[21] *See Ownership Reconsideration Order* at 94; 47 C.F.R. § 73.3555(d). The *Ownership Reconsideration Order* also established a national audience cap of 25 percent for non-minority-owned television stations and 30 percent for minority-owned television stations.

sion's objectives of fostering diversity and competition while providing station owners with more flexibility to structure their ownership patterns as they see fit to achieve individual business objectives. Additionally, such an approach would provide opportunity and incentive for successful broadcasters to acquire (and thereby strengthen) small and/or currently underachieving radio stations. The market rank-based option considers the size and diversity of each station's local market and would not factor into the national limit the stations owned in larger markets where a given degree of diversity has been achieved. Finally, each option is examined first with regard to its potential application to AM stations only, and then to both AM and FM stations.

Proposed Rule Revisions for AM Stations

11. With regard to the current numerically based limits, one option would be to eliminate the restriction for AM stations. Alternatively, we could raise the numerical limit on the number of AM stations that a licensee can own (*e.g.*, raising the limit from 12 to 18 AM stations). A third option would be to eliminate the restriction on the specific number of AM stations that could be owned, but retain an absolute cap on the total number of aural services. For example, the Commission could establish a total limit of 30 stations, all of which could be AM stations, but no more than 12 of the 30 could be FM stations. If a numerically based ruie is adopted, we might further include an exception whereby an AM station that falls below a certain percentage rating in its local market would not be counted in calculating the number of stations owned by a single entity. If we were to take this approach, what percentage should be used for such an exception? If that station's ratings subsequently rise above the benchmark, what, if any, action should be taken? Should the station then be counted? If so, how should the Commission proceed if counting that station will cause the group owner to exceed the national ownership limitation? [22] We seek comment on these issues.

12. An audience reach approach to AM radio ownership may be a more direct way to address diversity and concentration concerns than a numerically based approach. Because a single owner can own a considerable number of AM stations, depending on their size, without threatening diversity, it may be beneficial both to the public and to owners of AM stations if we adopt a national audience reach limitation as an alternative to the current numerical restriction. This approach would permit a single entity to increase its ownership of AM stations beyond the current 12-station limit, as long as the combined national audience reach of all group-owned radio stations does not exceed some set percentage of the national radio audience. We seek comment on this proposal. What would be an appropriate maximum audience reach? Should the limit be the same as that employed for the television multiple ownership rule -- 25 percent -- or should it be some other number? [23] How should audience reach be defined for purposes of the rule? Should we refer to ADI data or the population of the area within a station's signal contour? At night, clear-channel AM stations are sometimes received hundreds of miles away from their principal listening area. Is there a way to include distant listeners in such a station's audience reach figures, and is it desirable to do so? How, if at all, should stations not in operation be counted? In conjunction with the above proposal, one option is to permit parties observing the numerical limit to exceed any national reach limitation established, and vice versa. [24] We seek comment on these issues.

13. Another option is to consider the actual size of the local audience of a group owner's AM stations rather than their national audience reach. In the *Ownership Report and Order*, the Commission noted that the individual consumer perceives diversity in the communications marketplace with reference to local outlets of communication immediately available to him or her. [25] Thus, it may be of greater benefit to the listening public if the national ownership limitation incorporates a local element. Such a rule would be based on the cumulative audience of an owner's AM and FM stations, derived from local audience shares and local population data. For example, the Commission might permit acquisition of AM stations beyond the numerical limit if the cumulative local market shares of a group's AM and FM stations, weighted by population, would not exceed a given percentage of the national radio audience, such as ten percent. We seek comment on this proposal. Is ten percent a workable cutoff point? Would five percent further encourage acquisition of AM stations by group owners? What procedures should be followed if the market shares of a group owner's stations subsequently increase? As before, we propose that a group owner observing the numerical limit on stations be permitted to exceed any local market share limitation adopted.

14. Finally, we could adopt a rule for national AM station ownership based on market size or rank similar to the criteria currently used in waiving the "one-to-a-market," radio/television cross-ownership rule. Pursuant to that procedure, the Commission favorably views requests for waiver of the rule if the request involves, *inter alia*, stations in one of the top 25 television markets where

[22] We do not currently contemplate compelling a group owner to divest itself of any of its stations if it ultimately exceeds a benchmark established under this standard, or under the audience reach or local market share standards discussed below. If we were to compel divestiture, a disincentive would exist against purchasing and improving weak stations and maximizing station performance and success, which are key goals of this proceeding. We would be concerned, and might have to take appropriate action, if a particular group owner ultimately garnered an undue measure of market power as a result of any of the rule changes proposed here. We also seek comment on whether we should allow a group owner to sell stations as a group if, at the time of sale, the group exceeds our established market share threshold.

[23] *See* 47 C.F.R. § 73.3555(d).

[24] Using a 24-station limit and a 25 percent permissible audience share for purposes of illustration only, this proposal would permit a single group to own at least 24 stations regardless of cumulative audience reach. Conversely, if the cumulative reach of a group's stations totals 25 percent or less of the national radio audience, that group could own more than 24 stations. This is less restrictive than our present television multiple ownership rule, which generally prohibits ownership of more than 12 stations or ownership of stations with a cumulative national audience reach of more than 25 percent. *See* 47 C.F.R. § 73.3555(d)(1).

[25] *Ownership Report and Order* at 37.

there are at least 30 separately owned, operated and controlled broadcast licensees, or "voices." [26] This procedure affords group owners of television stations greater flexibility in larger, more diverse markets, in which our concerns with control by any individual group owner are less salient. We seek comment on whether a similar procedure would provide group owners of radio stations with the same type of flexibility and would thus create similar diversity benefits. Specifically, should we relax or eliminate the national AM radio ownership limitations so that AM stations in the top 25 markets where at least 30 separate broadcast voices exist do not count toward the multiple ownership limit? If we adopt the above approach, how should we define the relevant market? Is the 25th radio market an appropriate cutoff point, or should some other number be used?

Proposed Rule Revisions for FM Stations

15. The above proposals focus on AM radio, which has faced greater competitive hurdles due to its technical limitations. In focusing on the AM service as the service in most immediate need of the benefits that might flow from changing our multiple ownership rules, we do not suggest that licensees and listeners to FM stations might not also benefit if the current restrictions on multiple FM station ownership were also revised. Nor do we wish to introduce a new element of competitive disequilibrium into a radio marketplace that is already vigorously competitive. In many respects, AM and FM radio constitute a single audio service that faces increasing competition from other outlets of aural and visual communication. Thus, particularly in the case of smaller FM stations authorized to operate at low power levels, the need to ensure robust participation in the local market may serve as an equally persuasive rationale for changing the rules that apply to the FM service. Additionally, the advent of digital audio broadcasting could lessen the distinction between AM and FM radio.

16. Parties are therefore asked to comment on whether changes similar to those outlined for the AM service should be considered for the FM service, and how the two services should be treated differently, if at all. For example, while we propose that an owner be permitted to own 30 stations overall, no more than 12 of which may be FM, the converse (30 overall, no more than 12 of which may be AM) would not be appropriate in light of the relative strength of the FM service as compared with the AM service. Would it be appropriate to set the overall limit at 30, no more than 14 (or some other number) of which may be FM, so that the FM limitation is also relaxed, but to a lesser extent than the AM limitation? On the other hand, should the overall limit be set at 30 (or some other number) without distinguishing between the two services? We request comment on how any or all of the rules proposed above could be adapted to apply to both the AM and FM services.

III. THE CONTOUR OVERLAP RULE

17. A prerequisite to the provision of quality broadcasting service is that stations have a sufficient economic base to support innovation and investment in programming. Further, while the Commission will not review individual programming format decisions and proposals, to the extent feasible, incentives should be provided for stations to operate efficiently and to provide diverse types and formats of programming. [27] The contour overlap rule was established to foster diversity of ownership and viewpoint in the radio marketplace by prohibiting common ownership of more than one station in the same service in a given community. In 1938, the Commission adopted a presumption against granting new licenses which would result in such ownership structures.[28] In 1940, when it adopted rules governing commercial FM service, the Commission established a set prohibition on ownership of more than one FM station in a given area.[29] When the Commission promulgated its "chain broadcasting rules" a short time later, it included a provision barring network ownership of more than one AM station in the same area.[30] In 1943, the Commission adopted generalized rules which resulted in a case-by-case approach to requests for ownership of more than one station per service in an area.[31] These rules were superseded in 1964 by a fixed standard which prohibited common ownership of two or more commercial radio stations in the same service whose 1 mV/m contours overlap. [32]

18. In 1989, in its *Radio Contour Order*, the Commission adopted the current rule, modifying the contour overlap prohibition to increase the amount of permissible overlap between stations' service areas. [33] The present rule, a "principal city" standard, contains a contour limitation of 5 mV/m for AM stations and 3.16 mV/m for FM stations, which, unlike the prior benchmark, takes into account differences between AM and FM signals. *See* 47 C.F.R. § 73.3555(a). Pursuant to this rule, broadcasters are permitted to own two or more commercial radio stations in the same service in closer proximity to each other than was allowed by the previous 1 mV/m limitation, but ownership of two AM or of two FM stations licensed to the same principal city is prohibited. The Commission concluded that the 1 mV/m rule was overly restrictive and that the modified rule would enable broadcasters to realize some of the efficiencies of common ownership while maintaining economic competition and diversity of viewpoints.

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[26] *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989).

[27] *See FCC v. WNCN Listeners Guild*, 450 U. S. 582 (1981).

[28] *Genesee Radio Corp.*, 5 FCC 183 (1938).

[29] The Commission adopted this prohibition at the same time it adopted the six-station national ownership limit on FM stations. *See supra* note 8.

[30] *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, Regulation 3.106 (May 1941).

[31] *Order No. 84-A*, 8 Fed. Reg. 16065 (Nov. 23, 1943). This approach involved consideration of a variety of factors, such as the classes of the stations involved, the extent of overlap between the service contours of the stations, the area and populations within the overlap, interference limitations on the signals of the stations, and the degree of competition with other broadcast stations. For a description of this approach, see *First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989).

[32] *Report and Order* in Docket No. 14711, 45 FCC 1476, *recon. granted in part and denied in part*, 3 RR 2d 1554 (1964).

[33] *First Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989) *(Radio Contour Order)* .

Proposed Rule Revisions for AM Stations

19. In light of the aforementioned marketplace changes and our particular concern for the vitality of AM service, balanced with the need to foster diversity at the local level, we propose to relax the contour overlap rule. Common ownership of stations within the same area would not only allow group owners to take advantage of the economies of scale mentioned above in our discussion of the national ownership rule, but would enable owners to collocate studio and transmitter facilities for same-service stations (economies that are now available to owners of AM/FM combinations). Relaxation of the rule may also facilitate sales of multi-station advertising and cooperative production, as well as group purchase of programs and program services. Moreover, this approach could strengthen small or marginal AM stations.

20. Specifically, we propose to modify the current rule to permit a single entity to own two or more AM stations in the same area if the combined audience share of all the entity's stations in the area is below a given percentage of the local market. For example, a group owner could own any number of AM stations and an FM station in an area if those stations have a combined local audience share of ten percent or less at the time of acquisition. We believe that this type of approach could benefit the radio marketplace in that it will aid low-rated AM stations, which may be financially weak, by permitting several to be combined and by enabling some of them to be acquired by groups owning higher-rated and financially stronger stations. This approach would also permit AM stations ranked in the middle of the market to merge operations in an effort to improve their financial position. We seek comment on this proposal. Is ten percent a reasonable benchmark? Would five percent be more appropriate? [34] In determining a benchmark, should the Commission strive to aid all AM stations in a market, or only the smaller or less profitable AM stations? As an alternative to employing a straight market share benchmark, should we impose an overall numerical restriction in conjunction with the market share limit? [35]

21. The above proposals do not take into account the size of the particular market. A consistently applied market share standard will permit much less flexibility in smaller markets than in larger markets. For example, stations in a 25-station market, whether they are highly rated or struggling, will usually have smaller audience shares than their counterparts in a 10-station market. Consequently, a market share limit that affords group owners the opportunity to own several stations in a large market may provide few or no such ownership opportunities in a smaller market, even for the stations at the bottom of the ratings in that market. It may be appropriate, therefore, to adopt a more flexible framework for the combination of facilities in smaller markets. A countervailing consideration, however, is the more limited number of outlets in such markets. This concern could provide a basis for retaining a standard that minimizes the opportunity for combinations in markets with fewer listening options. We seek comment on the need for or propriety of adopting a standard that would vary with market size or according to the number of stations in a market, and the formula appropriate to provide for such variation. [36] If a given formula is dependent on the number of stations in a market, commenters should indicate whether all stations, only rated stations or only commercial stations should be counted, and the underlying rationale for such a selection.

22. Whatever proposal is adopted for modification of the contour overlap rule, we would not generally be inclined to compel divestiture if the combined audience shares of a group owner's stations increases above the local benchmark after acquisition. We believe that doing so would remove the incentive to purchase and strengthen a competitively weak station. We would be concerned, however, if the audience shares of the group owner's stations subsequently reaches an exceedingly high percentage of the market, and we seek comment on the appropriate Commission response. In any event, such an owner would be barred from acquiring additional stations in the market unless its stations' cumulative share subsequently

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[34] The following information illustrates the effects of a 10% or a 5 market share limitation. According to the 1989 Radio and Records Volume II Ratings Report and Directory, a 10% limit would permit the number 1 rated stations in Los Angeles, San Francisco and Philadelphia (markets number 2, 4 and 5) to each acquire at least three additional low-ranked stations or one additional mid-ranked station, or would permit three or four mid-ranked stations to be combined in each of those markets. A 5% limit, on the other hand, would prohibit the top five or six stations in Los Angeles or San Francisco, and the top eight or nine in Philadelphia from adding any another outlet, while allowing three or four of the lowest ranked stations to be combined. In addition, two lower mid-ranked stations could be combined in Los Angeles or San Francisco, but not in Philadelphia. In Cleveland, Phoenix, and Portland (markets 22, 23 and 25), a 10% limit would permit all but the top-ranked stations in Cleveland and Phoenix to acquire a low-ranked station. In addition, mid-ranked stations could add another mid-ranked or two low ranked stations in each market, and five to seven of the lowest ranked stations could be combined. A 5% limit would prevent the top eight or nine stations from adding another, while permitting lower mid-ranked stations to combine or add two of the lowest ranked stations. Three or four of the very lowest ranked stations could be combined in each market. In Orlando and Nashville (markets 44 and 47) a 10% limit would prevent the top three or four stations from adding another station, and in Louisville (market number 49) only the top station would be so prohibited. Any other station in these markets could add at least one more low-ranked station, and lower mid-ranked stations could be combined in pairs. A 5% limit would prohibit additions to all but lower mid-ranked stations, which could add one low-ranked station. Several of the lowest ranked stations could be combined under either limitation.

[35] This proposal is akin to the current limitation on multiple ownership of television stations which employs both a numerical limitation and an audience reach cap. *See* 47 C.F.R. § 73.3555(d).

[36] One possible formula would be based upon a ratio limitation, such as 1/n, where n is the number of stations (or of rated stations, or of commercial stations) in a market. With such a standard, markets with 20 stations would have a five percent market share limitation, while markets with 10 stations would have a ten percent market share limitation. With a standard of 2/n, markets with 20 stations would have a ten percent share limitation and markets with 10 stations would have a twenty percent share limitation, and so on. A ratio-based standard could be combined with a range limitation to prevent extremes at either end, such as a standard of 1.5/n but in no case less than ten percent or greater than fifteen percent. Alternatively, specific market share standards could be established for each group of markets, based on market rank or size. For example, a ten percent standard for the top 25 markets, a 12 percent standard for the next 25 markets, and so on.

fell below the benchmark. We seek comment on these issues. A further question is how audience share should be calculated. Should we refer to the most recently published ratings for the market as of the date of the seller's application for assignment or the group owner's application for a new station? Should we instead average the stations' ratings for the previous four quarters or some other period, or use the highest rating achieved during some recent period? Would such a rule provide perverse incentives to some stations, at least with regard to short-term performance? What if ratings do not exist for a particular station? What market share, if any, should we attribute to stations that are not currently in operation? We seek comment on these issues.

23. In addition, although we favor increasing the flexibility of our ownership rules, we question whether the public would benefit if commonly owned stations in the same community were permitted to simultaneously broadcast the same programming. Such use of the spectrum is generally inefficient, and inefficient use of the spectrum is not in the public interest. Nonetheless, permitting same-service simulcasting for a limited period of time would provide owners with a transitional period after acquisition of a new station, in which they may promote their new dial position and redirect established listening patterns. [37] What would be a reasonable transitional period?

24. We also note that in the *AM Notice* we proposed to permit one entity to own two AM stations in an area if such common ownership would reduce interference. [38] We do not believe that the objectives of that proceeding are frustrated by our proposal in this proceeding. The rule change proposed in the *AM Notice* is based on interference considerations, while the rule change proposed here is designed to keep pace with changing competitive and economic conditions in the communications industry. Moreover, unlike this *Notice*, the *AM Notice* would permit simulcasting on commonly-owned, same-service stations with overlapping 5 mV/m contours if the stations served substantially different markets or communities. [39] Nevertheless, we request comment on the interplay between the proposals presented here and those advanced in the *AM Notice*.

Proposed Rule Revisions for FM Stations

25. For the reasons stated at paragraph 15, above, parties are asked to comment on the degree to which the foregoing proposals should be extended to FM radio, and how any revised rules should be crafted to take into account our historical efforts to treat AM and FM as a single aural service. For example, if we were to adopt an audience share approach governing the number of stations that can be owned in a local market, should we permit a single owner to cumulatively acquire an unlimited number of radio stations in an area, regardless of whether they are AM or FM, if those stations have a combined audience share less than some set percentage of the local market? Would this cause some broadcasters to concentrate their efforts on acquiring FM stations to the detriment of AM service? If a numerical limit is adopted for FM stations, what should it be? [40] In general, to what extent would it be necessary to differentiate between the AM and FM services for each of the proposals discussed above?

IV. JOINT VENTURES

26. We also seek comment on permitting, or even encouraging, separately owned and licensed radio stations, consistent with the requirements of the antitrust laws, to enter into joint ventures or other cooperative arrangements. [41] Pursuant to these types of arrangements, separately owned stations could function cooperatively in terms of advertising sales, technical facilities and formats, but each would maintain an independent editorial voice. We believe that this practice strengthens the service the public receives, while continuing to maximize, to the extent feasible, the number of voices in the market. Such an approach can be particularly advantageous for struggling stations by permitting them to pool resources. For example, stations that share news gathering resources and personnel are able to provide expanded news coverage at reduced cost. Stations with joint advertising agreements can better appeal to advertisers seeking larger or multidemographic audiences, and can pool demographic data rather than independently performing expensive community research. These cost-saving arrangements enable stations to spend more money in other areas so as to remain competitive.

27. Joint ventures are not now specifically precluded by any Commission rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities. Cooperative arrangements in terms of technical facilities, such as joint tower use, are common and are indeed encouraged in order to avoid unnecessary intrusions into aviation air space. Cooperative advertising sales and joint sales practices, once specifically discouraged under Commission policies, are no longer so restricted[42] These arrangements could, however, be subject to scrutiny under the Commission's "cross-interest" policies, and if not carefully formulated could be subject to challenge as involving anticompetitive price fixing or market

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[37] A similar proposal was advanced in the *AM Notice*. The Commission proposed in that proceeding to permit simulcasting on existing AM stations and stations in the expanded AM band for a transitional period, so as to facilitate migration to the expanded band. *AM Notice* at 4392.

[38] *See supra* note 5, *AM Notice* at 4387.

[39] *Id.*

[40] We do not intend here to alter our longstanding policy regarding common ownership of one AM and one FM station in an area. Accordingly, we will continue to permit a single entity to own one AM/FM combination in an area, even if the established numerical or percentage limitation is exceeded. We believe any change in this policy would be unduly disruptive to the radio industry. Certain of our proposals described above, however, might allow a single entity to own two or more AM/FM combinations in the same area.

[41] The issues raised here are distinct from those in our outstanding *Further Notice of Inquiry/Notice of Proposed Rule Making* in MM Docket No. 87-154, 4 FCC Rcd 2035 (1989). That proceeding addresses joint ventures involving radio stations operating in the same service in the same market that seek to construct or purchase a radio station in another service in that market.

[42] *See Second Report and Order* in Docket No. 83-842, 51 Fed. Reg. 11914 (April 8, 1986).

divisions.[43] Although these arrangements would, to some degree, limit economic competition among the specifically involved participants, they could enhance competition in the market as a whole, particularly if individual audience segments were afforded more effective service as a result. "Economic research suggests this might well be the case.[44]

28. While the above discussion suggests that there are benefits from encouraging certain types of cooperative arrangements between broadcasters, we believe it is desirable to obtain comment on whether to prescribe limits on certain aspects of these agreements. For example, while these arrangements may serve the public interest in some highly competitive markets by securing a firmer economic base for the stations involved, or may result in the provision of quality programming service to a more sparsely populated market area, a more careful review may be warranted where competition is limited and stations cease to become full-fledged competitors. Accordingly, we believe that these arrangements are worth considering, with certain careful qualifications, as a means of improving the service listeners receive. At a minimum these qualifications would have to include:

1) Full and careful compliance with the antitrust laws;

2) A provision that such cooperative arrangements be undertaken only with a sufficiently limited number of stations in sufficiently large and diverse markets, so that price and service competition outside the arrangement remain effective and robust;

3) A requirement that each licensee involved retain control, in particular, editorial control, sufficient to comply with all Commission Rules and public interest requirements; and

4) Mechanisms for prompt termination of the arrangement when individual participants believe that it is no longer consistent with the public interest or their responsibilities as licensees.

29. We seek comment on this proposal. How should "retention of editorial control" be assured? The Commission is able to monitor joint station arrangements through complaints, requests for rulings to approve such agreements, petitions to deny renewal applications or the filing of mutually exclusive applications against renewal applicants. Are the Commission's present complaint and compliance procedures adequate to assure that the licensees are not in violation of the Communications Act or Commission rules or policies, or should they be augmented, for example with reporting requirements? At what point would reporting requirements become so burdensome as to deter beneficial cooperative arrangements? In addition, what should be the maximum number of stations in a market permitted to participate? Should we instead use an audience share limitation, or a combination numerical limit/audience share limit? In which markets should such arrangements be permitted? Could we use the 25 markets/30 voices test used for television/radio cross-ownership (and proposed above regarding modification of the national ownership rule)? Can safeguards be established regarding termination of these agreements that will not inhibit the parties' right to contract freely among themselves?

30. Similarly, the recent proliferation of programming agreements in common service areas, or "time brokerage" agreements, has raised a number of concerns that the Commission has not previously addressed in the context of the contour overlap and cross-interest policies, as evidenced by the complaints filed with the Commission.[45] The Commission has previously determined that issues of joint advertising sales should be left to antitrust enforcement, [46] and has specifically amended its "cross-interest" policy to exempt time brokerage arrangements from its coverage. [47] Provided that licensees maintain control over station operations [48] and otherwise comply with the Commission's Rules and policies, the agreements do not violate the law. For example, a recent ruling by the Mass Media Bureau denied a complaint from a competitor alleging that the effectuation of reciprocal time brokerage agreements between two Miami stations constituted an unauthorized transfer of control, or violated the contour overlap rule or cross-interest policy. [49] Such arrangements may also assist the survival of stations in financial distress, thereby contributing significantly to the service received by the public from otherwise silent stations.

31. There may be, however, market situations that would warrant appropriate limits on these arrangements, particularly where significant competitive damage could not be sufficiently addressed via antitrust enforcement. We seek comment on whether certain types of market situations would warrant careful scrutiny of joint programming agreements between broadcasters in the same market, and if so, which ones. Such comments should address market size and the amount of common program-

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[43] *See* Notes 45 and 49 for examples of challenges to time brokerage arrangements.

[44] *See* Steiner, *Program Patterns and Preferences, and the Viability of Competition in Radio Broadcasting*, 66 Q. J. Econ. 194-223 (1952).

[45] *See, e.g.*, Letter of East Shore Broadcasting Corporation, licensee of WRHD and WRCN-FM, Riverhead, New York (filed Dec. 18, 1990); Request for Advisory Opinion filed by Independence Broadcasting Company, licensee of KAMG-AM, Victoria, Texas (filed Dec. 13, 1990); Letter of Citadel Associates, L. P., licensee of KKFM-FM, Colorado Springs, Colorado (filed Nov. 23, 1990) (Commission response issued as *Letter to Peter D. O'Connell* from Chief, Mass Media Bureau, 6 FCC Rcd 1869 (1991)); Letter of Capital Cities/ABC, licensee of WTVD-TV, Durham, North Carolina (filed Nov. 6, 1990) (withdrawn Dec. 11, 1990).

[46] *Second Report and Order* in MM Docket No. 83-842, FCC 86-111 (March 31, 1986), 51 Fed. Reg. 11914 (April 8, 1986).

[47] *Policy Statement* in MM Docket No. 87-154, 4 FCC Rcd 2208, 2214 (1989).

[48] *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981).

[49] *Letter to Roy R. Russo* from Chief, Mass Media Bureau, 5 FCC Rcd 7586 (1990). *See also Letter to Joseph A. Belisle* from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, 5 FCC Rcd 7585 (1990) (released Oct. 17, 1990) (stating that network affiliation agreement for 12 to 24 hours of programming per day between stations with overlapping contours violates no Commission Rule or policy); *accord Letter to J. Dominic Monahan* from Chief, Mass Media Bureau, 6 FCC Rcd 1867 (1991); *Letter to Brian M. Madden* from Chief, Mass Media Bureau, 6 FCC Rcd 1871 (1991).

ming and advertising sales permitted in relation to the amount of service area overlap. Should same-service agreements be treated differently from cross-service agreements? Should there be a limit on the number of stations in the same market (or service) a single program supplier may serve? Should simulcast agreements be treated differently from other programming agreements? Should agreements involving 24 hours per day of programming be permitted? We also seek comment on the possible impact at renewal time for stations with these types of agreements, particularly those that involve the provision of programming approaching 24 hours per day. Do such agreements circumvent our ownership restrictions, or is it sufficient that diversity of86ownership and attendant editorial discretion are maintained? A related concern is the simulcast by a smaller market FM station of the programming of a neighboring major market FM station. We invite comments on whether this situation effectively allows an FM station to extend its own contour into that of another FM station, even though Section 74.1232(d)(1) would prohibit that station from owning an FM translator to accomplish the same purpose. What are the public interest implications of that result?

32. Finally, we seek comment on the interaction among all of the above joint venture issues and our proposals to modify the national and local ownership rules. Does a permissive policy toward joint ventures obviate any need to alter the ownership limits? Does altering the ownership limits obviate any need to encourage joint ventures?

V. ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

33. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. § § 1.1202, 1.1203 and 1.1206(a).

Comment Information

34. Pursuant to applicable procedures set forth in § § 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **August 5, 1991**, and reply comments on or before **September 5, 1991**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

35. **Reason for the Action**: This proceeding was initiated to review and update the Commission's national and local radio ownership rules.

36. **Objective of this Action**: The actions proposed in this *Notice* are intended to relax some of the national and local ownership restrictions on radio broadcasters to enable them to adjust to the changing communications marketplace, and to better respond to the needs of the public.

37. **Legal Basis**: Authority for the actions proposed in this *Notice* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. § § 154 and 303.

38. **Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule**: None.

39. **Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule**: None.

40. **Description, Potential Impact and Number of Small Entities Involved**: Approximately 10,000 existing radio broadcasters of all sizes may be affected by the proposals contained in this decision.

41. **Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives**: The proposals contained in this Notice are meant to simplify and ease the regulatory burden currently placed on commercial radio broadcasters.

42. As required by § 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

Additional Information

43. For additional information on this proceeding, contact Jane Hinckley, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT OF CHAIRMAN ALFRED C. SIKES

Re: Notice of Proposed Rulemaking on Revision of Radio Rules and Policies

By adopting this Notice of Proposed Rulemaking, the Commission recognizes the need to assure that the structural rules governing radio broadcasting, no less than the rest of our rules, need to undergo a reality check.

The reality that radio stations face today is vastly different from the reality of a decade ago. Now there is the additional competition each radio station licensee faces from other stations, a degree of competition that did not exist ten years ago and that will only increase in the foreseeable future. There also are the changes that the industry faces with the coming of digital audio technology, changes that could transform the future of radio.

The shadow these contemporary realities casts on our rules demands that we reassess them carefully. The results of increasing competition strongly suggest that more stations are not always synonymous with more diversity. Those who attack this proceeding ignore the fact that when insufficient audiences and revenues cause stations to go dark or cut back on service, diversity is not enhanced.

I welcome Commissioner Barrett's proposals, which are intended to assure that the Commission gives careful and particular consideration to the effect the rules have on both small businesses and new entrants into the broadcasting business. I wholeheartedly agree that the Commission should take steps to assure that small businessmen, whether they are current licensees or new entrants, understand the impact of our rules and decisions on the future of telecommunications. Increasing that kind of understanding can do more to increase diversity by educating businesses about new opportunities in all telecommunications businesses. I know that all Commissioners agree that the final shape of the small business initiative will be developed in conjunction with OMB, GSA, the Small Business Administration, and other interested Government agencies, to assure that we use Commission resources in the most efficient, cost-effective manner possible and to avoid duplicating the functions of other similar Government programs or initiatives.

As this proceeding moves forward, it needs to be borne in mind that our current ownership rules are a means to an end -- *not* an end in and of themselves. Where the means is maximizing diversified ownership and the end actually attained is increased diversity, the rules make sense. But where the means produce perverse results, logic as well as sound public policy require that we not be blind to this reality and that we act reasonably in responding to it. It is with those thoughts in mind that I look forward to evaluating the evidence compiled in this proceeding.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

In re: Notice of Proposed Rule Making on the Revision of Radio Rules and Policies

Broadcast radio markets have changed considerably over the past decade. The proliferation of over-the-air radio stations, aural cable services and the possibility of satellite delivered radio to mobile as well as fixed locations creates a very competitive radio marketplace. I believe it is appropriate for the Commission to examine closely regulations that might thwart broadcast radio's ability to compete. At the same time, however, the Commission must be careful not to place disproportionate emphasis on competition at the expense of public interest, localism, diversity and minority ownership.

I agree that we should ask questions about if, or how, Commission regulations may limit radio broadcasters' ability to compete in the changing marketplace. I do not necessarily agree with some of the proposals presented in the Notice of Proposed Rule Making. Generally, I would focus this proceeding on AM radio only, and more specifically on the numerical limits on ownership. I believe that ownership limits based on national or local audience levels may invite a number of problems for the Commission. The Commission could find itself mired in local population figures and local radio audience shares in its efforts to resolve disputes or to establish the appropriate benchmarks. This is particularly difficult since audience shares change frequently.

The proposal to allow the ownership of more than one AM station within a market so long as combined local market share does not exceed a given level, and the possibility of joint ventures, may present significant problems for individually owned local radio stations. Local broadcasters may be faced with increased competition from dominant group owners who may own two or more AM stations and an FM outlet within a community, especially if there are no penalties if the audience share benchmark is exceeded. Additionally, joint ventures may create undesirable local market conditions. More rural markets may be dominated by adjacent, more populated or urban markets.

Special attention must be given to the effects of the proposals on the Commission's interest in fostering minority ownership. Although the item references petitions filed by the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition and the National Black Media Coalition to increase the current 14 AM and 14 FM ownership limitation to 20 AM and 20 FM, these petitions reference the existing 12-12-12 rules and the exception they provide for minority owned stations. The numerical ownership proposals in the Notice pertain to ownership in general, not just ownership by minorities. To the extent that numerical limitations can affect minority ownership, the numerical ownership proposals contained in the Notice could, in fact, reduce the number of stations available for minority ownership. Such an outcome runs contrary to Commission objectives and policies to increase minority ownership of broadcast stations.

Within the context of the proposals to allow for common ownership of broadcast radio stations in a market, I also have concerns about the proposal to allow simulcasting on these commonly owned stations. Commenters should indicate when simulcasting would be appropriate and for what duration. How does simulcasting effect diversity?

Finally, I agree we should examine the proliferation of time brokering requests. The growth of such arrangements either could be an indication of the financial condition faced by local radio broadcasters, or an opportunity to maximize profits at the expense of serving the public interest, or a real opportunity to serve the community by providing programming otherwise not available on the station. Careful attention must be given to this matter.

In responding to the proposals contained in this Notice, commenters also should address the ramifications of these proposals to the principles of public interest, localism, diversity and minority ownership. Although we must assure our rules do not inhibit a competitive, viable broadcast industry, a license is no guarantee that the broadcaster's operation will be profitable. Obviously, profitable broadcasters are in a better position to serve the public interest. What distinguishes broadcasting from other industries, however, is its public interest requirements.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Re: Revision of Radio Rules and Policies

I do not oppose examining the Commission's rules in this proceeding. I believe that periodically the Commission must examine its rules to ensure that they comport with marketplace realities. Although I have reached no final conclusions, commenting parties will have a heavy burden to justify modification of the ownership limits. The reason I have reservations regarding modification of the ownership rules is my concern for diversity of media ownership.

"Diversity of media" ownership is one of the principle components embodied in the Commission's public interest mandate. 47 U.S.C. Section 309(a). Diversity of media ownership also is an important underpinning to accomplishing our First Amendment goals. See, e.g. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 390 (1969). Because of the Commission's diversity goals, we have opened the door for new entrants into the broadcasting industry through our comparative hearing process, and the limitations on the number of stations any one party may own.

In the comparative hearing process, the Commission has determined that "diversification is a factor of primary significance."[1] New applicants are preferred over those applicants with other mass media ownership interests when competing for new broadcast stations. The comparative hearing process has helped structure the broadcast industry so that ownership of stations is not concentrated in the hands of a few entities. In addition, the Commission's adoption of multiple ownership rules and its cross-ownership policies promotes diversity and competition among broadcast interests. By limiting the number of stations that can be owned by parties on a national and local level, the Commission has created opportunities for new entrants to purchase existing broadcast properties. In fact, many of the stations currently owned by minorities or women came about after mergers and the need to spin off stations under the Commission's multiple ownership limitations. The ownership limits have ensured that more than a handful of people own this nation's broadcast stations.

Minorities and women have just begun to make inroads into the broadcast industry. Since the adoption of our minority ownership policies in 1978, the percentage of stations owned by minorities is barely above three percent. The existing AM and FM broadcast bands offer few opportunities for new allotments. In many instances, increases in the percentage of minority or female ownership islikely to come from the purchase of existing broadcast properties.[2] Because of the decreased opportunities for new stations, it is important that the Commission consider the ramifications of ownership limit changes upon new entrants, including minorities and women.

In light of my views on the need to maintain and promote diversity of media ownership, I am concerned about the direction the Commission may be heading in this proceeding. I do not oppose permitting some concentration of media ownership. I am well aware of the benefits gained from joint efficiencies brought about through economies of scale from the ownership of more than one station in a market, or the ownership of numerous stations on a national level. I write separately out of my desire to ensure, that in allowing increased ownership, the Commission remains fully cognizant of the public interest and diversity concerns we have long supported.

I question elimination or substantial relaxation of the multiple ownership rules without some potential public interest benefit. In the past, the Commission justified relaxation of the ownership restrictions by demonstrating the benefits to the public from increased concentration in terms of service to local communities. The national ownership limits of 14 AM and 14 FM stations was justified by the fact that it encouraged minority ownership through the requirement that at least two of the stations be minority owned or controlled. In this case, concern for concentration was outweighed by the other public interest benefits of increasing minority ownership of stations. Without full consideration of the impact of increasing the maximum number of stations a party may own, the Commission could undermine our diversity and minority ownership goals. I encourage parties to comment on the effects of modifying the ownership restrictions on minorities and women.

I also am concerned that the Commission commences a reexamination of the radio ownership limits at a time when we are about to explore new technologies which could radically change the radio industry. The Commission has just begun a proceeding to examine digital audio broadcasting (DAB). DAB has the potential to equalize AM and FM radio from competitive and technical standpoints. The implementation of DAB could affect the financial viability of AM and FM radio. The values for stations could also be dramatically changed once DAB is implemented. In today's marketplace, the ownership of two or more AM stationsmay be appropriate. However, in the future, if one considers that these stations may soon be providing a CD quality sound, it may make less sense to allow too much concentration. In addition, without a full understanding of the impact of DAB, many small

market radio stations may be encouraged to sell to speculators. I will be particularly interested in comments regarding the impact of DAB on the proposed modifications to our ownership restrictions.

Finally, I believe the ramifications of the Commission's action on local communities, new entrants, minorities and women must be considered in all the Commission's mass media proceedings. This proceeding, along with the two proceedings dealing with the comparative hearing process, has lead me to the conclusion that the Commission needs a process to more fully consider the impact of our rule revisions on these parties. I have held discussions with Chairman Sikes and my other colleagues regarding these issues. I am happy to announce three initiatives. The Commission plans to take the steps necessary (1) to form an Advisory Committee on Small Business, (2) establish an FCC Small Business office to provide information and interface actions for small business and (3) hold a Conference on entrepreneurial communications opportunities later this year. Although this initiative has been announced in this broadcast docket, our focus is much broader. We also need to examine the effects of our actions and provide information to small businesses in the telecommunications, private radio, and new technology fields.

FOOTNOTES TO THE STATEMENT

[1] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).

[2] While not a part of this proceeding, I also note that there currently is a freeze on new television station allocations.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In re: Notice of Proposed Rule Making on the Revision of Radio Rules and Policies

I vote for this item, but I do so with serious reservations. Nevertheless, I support asking the questions we pose in the *Notice* in an effort to bring attention to some of the serious problems plaguing the radio industry today.

Foremost is a glut of stations, caused in large part by the FCC's efforts in the recent past to increase diversity by multiplying the number of broadcast voices. Since 1984, the number of FM stations has increased 41%.[1] Radio Business Report, February 25, 1991, page 5. If all current FM applications should prove successful, the result will be a virtual doubling of FM stations in the near future. Industry sources suggest that only 30 to 40% of radio stations show any level of operating profitability, and that station values have dropped 30% in recent years.[2]

At a recent Annenberg seminar on digital audio broadcasting, one industry representative sketched the reality in stark terms: except in times of rapid economic growth, every new station divides the advertising pie into smaller pieces, creating a desperate feeding frenzy for limited revenues. A situation could result in which no one station will be able to deliver the critical mass of listeners necessary to attract advertisers at all. He also noted that less than 9/10 of 1% of all radio stations--- less than 100 stations in the U. S. --- billed $10 million, compared to the average revenue for local Washington, D.C. area supermarkets of $22 million. If the average neighborhood Giant store were a radio station, it would be the twelfth largest radio station in the nation.[3]

What do such figures imply for the public interest? For continued diversity of broadcast voices? For the ability of radio stations to engage in public service efforts and to serve local community needs?

The *Notice* presents a number of proposals designed to improve the current situation, including easing the FCC's national and local ownership rules and encouraging joint ventures. Frankly, however, some of these solutions disturb me. Increasing the local or national ownership limits and encouraging time brokerage, for example, could diminish marketplace diversity by rewarding station owners with the deepest pockets at the expense of those who can best serve their local communities.

Minorities, women, small station owners, and rural broadcasters, moreover--- those who provide the diversity we value so highly--- may have difficulty acquiring a broadcast license or keeping a struggling station alive in such an environment. Should we sacrifice our traditional concerns for localism and diversity in order to encourage consolidation and mergers, presumably to enhance the economic viability of the industry?

I am also concerned about time brokerage, which may tacitly permit consolidation without any change in our ownership rules. I believe that the Commission should take a serious look at this issue--- especially the extent to which stations in the same community might use time brokerage arrangements to simulcast the same programming 24 hours a day. Even more troublesome would be evidence that major market stations use this practice to extend their reach into neighboring smaller markets.

In view of these serious concerns, I favor a cautious, deliberate review of the comments received in this proceeding. In particular, we should evaluate the potential impact of digital audio broadcasting on the radio marketplace, an issue which seems to have been given short shrift in this *Notice*.

FOOTNOTES TO THE STATEMENT

[1] While not a part of this proceeding, I also note that there currently is a freeze on new television station allocations.

[2] Comments of Randall T. Odeneal, Sconnix Broadcasting Company, Annenberg DAB Seminar, April 11, 1991.

[3] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-48

In re Applications of

CARMEL BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880208MK
LONE CYPRESS RADIO ASSOCIATES, INC.	File No. BPH-880210ML
HIGHLANDS BROADCASTING CO., INC.	File No. BPH-880211MK
PASO HONDO BROADCASTING LIMITED PARTNERSHIP, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-880211ML
STODDARD JOHNSTON and SHERRIE McCULLOUGH d/b/a J & M BROADCASTING COMPANY	File No. BPH-880211MM
CAL TOWER BROADCAST GROUP	File No. BPH-880211MR

For Construction Permit for a
New FM Station, Channel 238A,
in Carmel, California

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1991; Released: June 4, 1991

By the Commission:

1. Before the Commission for consideration are a *Memorandum Opinion and Order*, FCC 90M-3695, released November 23, 1990, by the presiding ALJ in this proceeding, a Petition for Extraordinary Review filed December 18, 1990, by Carmel Broadcasting Limited Partnership (CBLP), and a Joint Opposition filed December 31, 1990, by Lone Cypress Associates, Inc., J & M Broadcasting Company, and Cal Tower Broadcast Group. We will deny CBLP's petition.

2. In the interlocutory ruling CBLP seeks to have reviewed, the ALJ added hearing issues against CBLP to determine whether Frederik R. L. Osborne (president and majority stockholder of Auburn Cablevision, Inc., which is in turn a limited partner of CBLP with a 75% equity interest) has abused the Commission's processes in this and other comparative licensing proceedings, and, if so, the effect thereof on CBLP's qualifications to be a Commission licensee. In his ruling, the ALJ granted a petition to enlarge issues filed by another applicant in this case, after finding that the matters raised by the petitioner were of substantial public interest importance and could be decisionally significant in this proceeding. In addition to alleging that Osborne was the real party-in-interest behind CBLP and, thus, that CBLP's purported limited partnership was not *bona fide*, the petitioner pointed out that Osborne is a limited partner in his individual capacity in Fresno FM Limited Partnership, an applicant for a new FM station at Fresno, California, which the Review Board recently found to be a sham applicant. *See Carta Corporation*, 5 FCC Rcd 3696, 3702 ¶ 18 (1990). The petitioner further indicated that the Board noted in Fresno that it was alleged, and not materially refuted, that Osborne was also involved in a sham application in the Irondequoit, New York FM proceeding (MM Docket No. 87-517), and that his conduct in both of those cases called into question Osborne's "modus operandi" that could be raised in other proceedings in which he is involved. *Id.* at 3705 n.13.

3. CBLP has not provided adequate grounds for the extraordinary relief requested, *i.e.* a waiver of 47 C.F.R. § 1.301(b). That rule states that appeals of an ALJ's interlocutory ruling are to be deferred until the time for filing exceptions to the Initial Decision in the proceeding, unless specifically authorized by the ALJ.[1] The purpose behind the rule is to ensure orderly procedure in Commission adjudicatory proceedings and to avoid lengthy delays that would occur if proceedings were interrupted by appeals every time a party is dissatisfied with an ALJ's ruling on an interlocutory matter. Accordingly, it is the Commission's policy not to entertain such requests except where it has been shown that there has been such a flagrant abuse of discretion as would likely require a reversal of the Initial Decision and a hearing *de novo*, or where the interlocutory ruling raises far-reaching and vital concerns to the public interest which could not otherwise be adequately protected. *See Gilbert Broadcasting Corporation*, 56 FCC 2d 1024 (1975); and *Communications Satellite Corp.*, 32 FCC 2d 533 (1971).[2]

4. In our opinion, CBLP has not shown that waiver of Section 1.301(b) is justified for either of the above reasons. Its contentions that the ALJ's action was dictated by the Board's footnote in *Carta*, *supra*, and that because of the Board's allegedly improper footnote, its arguments opposing the addition of hearing issues were not given due consideration by the ALJ, furnish no basis for the extraordinary relief requested. [3] Merely because CBLP disagrees with the ALJ's decision to enlarge the issues does not establish that the ALJ failed to give due and appropriate consideration to its opposing arguments. In fact, the ALJ's order in question reflects analysis of the same arguments that CBLP is making in its instant petition. Whether the ALJ's analysis of those arguments is correct or not is not a matter warranting grant of CBLP's petition.

5. In this regard, even if CBLP is correct that the ALJ's analysis is wrong, we are not persuaded that it has demonstrated that this alleged error constitutes such a flagrant abuse of discretion as would require a reversal of the

Initial Decision and a hearing *de novo*. Nor would it constitute a matter of far-reaching and vital concern to the public interest which could not otherwise be adequately resolved in the regular course of the proceeding. The same is true with respect to CBLP's argument that the record evidence in the Fresno and Irondequoit cases does not support the Board's footnote or the ALJ's action, allegedly taken pursuant to the footnote, specifying abuse of process issues in this case. In sum, while the ALJ's action may result in additional expenditures by the parties and may prolong the proceeding, those factors, standing alone, provide no right for an immediate appeal of an ALJ's interlocutory ruling. *See KHYM Broadcasting Co.*, 44 RR 2d 669 (1978). Under these circumstances, CBLP has not demonstrated that the extraordinary relief requested is warranted.

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Review filed December 18, 1990, by Carmel Broadcasting Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The ALJ did not grant CBLP leave to appeal in this case.

[2] *See* also *Amendment of Parts 0 and 1 of the Commission's Rules*, 26 FCC 2d 331, 332-33 ¶¶ 4-7 (1970).

[3] CBLP relies on *Fresno FM Limited Partnership*, 5 FCC Rcd 7261 (1990), which concerned an interlocutory Motion for Leave to File Application for Review based in part on contentions that because of the Board's decision in *Carta*, *supra*, petitions to enlarge issues could be filed in other proceedings against applicants in which Osborne is a principal. In this regard, the Commission denied Fresno's interlocutory Application for Review, 5 FCC Rcd at 7261 ¶ 6, and stated that the ALJs in those other proceedings would give due and appropriate consideration to any arguments put forth in opposition to such petitions to enlarge.

Before the
Federal Communications Commission
Washington D. C. 20554

MM Docket No. 89-570

In the Matter of

Amendment of Section 73.202(b),	RM-7061
Table of Allotments,	RM-7110
FM Broadcast Stations.	
(Lafayette, Tennessee and	
Campbellsville, Kentucky) [1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 15, 1991; Released: June 3, 1991

By the Chief, Allocations Branch:

1. At the request of Ivan Davis ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8589 (1989), proposing the allotment of Channel 281A to Lafayette, Tennessee. In response to the *Notice*, petitioner filed comments restating its continuing interest, and Lafayette Broadcasting Company, Inc. filed comments supporting the allotment at Lafayette.

2. Previously, Heartland Communications Inc. ("Heartland") had filed a petition for rule making requesting the substitution of Channel 281C3 for Channel 281A at Campbellsville, Kentucky. The Heartland proposal would permit Station WCKQ(FM) to upgrade its facilities, but the allotment of Channel 281C3 to Campbellsville would conflict with the proposed allotment of Channel 281A at Lafayette. Although Heartland did not file timely comments in this proceeding, its proposal was treated as a counterproposal (RM-7110). [2]

3. However, in reply comments Heartland proposed a resolution of the conflict between the Campbellsville and Lafayette proposals. That plan called for the substitution of channels at Munfordville, Kentucky and Carthage, Tennessee. Because the Heartland resolution proposal brought new communities into this case, it constitutes a counterproposal, but it was filed beyond the time during which such proposals are accepted. *See* 5 FCC Rcd 931 (1990). Thus, we will not consider the Heartland resolution proposal in this case. [3]

4. In an effort to resolve the technical conflicts between Heartland's original proposal and the request for the new allotment at Lafayette, the staff has performed a engineering analysis. Our study shows that there is no alternate channel available as an upgrade for Campbellsville or alternate Class A allotment for Lafayette. Therefore, we must comparatively consider these proposals. Under the Commission's FM allotment priorities, a first local FM service is generally preferred over a proposal to upgrade an existing facility. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982); *see also Benton, Arkansas, et al.*, 2 FCC Rcd 1963, 1965 (1987). We find that the provision of a new first service at Lafayette must be preferred over a proposal to upgrade existing service in Campbellsville.

5. Therefore, we believe the public interest would be served by allotting Channel 281A to Lafayette, Tennessee, as that community's first local FM service. Channel 281A can be allotted to Lafayette in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [4]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 19, 1991** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lafayette, Tennessee	281A

7. The window period for filing applications will open on **July 22, 1991,** and close on **August 21, 1991.**

8. IT IS FURTHER ORDERED, That the petition for rule making filed by Heartland Communications, Inc. (RM-7110) IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] The community of Campbellsville, Kentucky, has been added to the caption

[2] Public Notice of the counterproposal was given on February 27, 1990, Report No. 1808.

[3] The resolution offered by Heartland proposes a channel allotment for Munfordville that is in conflict with a petition for rule making (RM-7580) that, *inter alia*, proposes the substitution of Channel 294A at Horse Cave, Kentucky. We will treat Heartland's resolution as a petition for rule making (RM-7712) and consider it in conjunction with RM-7580.

[4] The city reference coordinates are North Latitude 36-31-24 and West Longitude 86-01-36. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c) with respect to Station WGFK(FM), Channel 283C1, Gallatin, Tennessee.

Before the
Federal Communications Commission
Washington D. C. 20554

MM Docket No. 91-148

In the Matter of

Amendment of Section 73.202(b), RM-7711
Table of Allotments,
FM Broadcast Stations.
(Edisto Beach, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 22, 1991; Released: June 3, 1991

Comment Date: July 26, 1991
Reply Comment Date: August 12, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Toni T. Rinehart ("petitioner") requesting the allotment of Channel 229A to Edisto Beach, South Carolina, as its first local FM service. Petitioner states that she will apply for the channel, if allotted.

2. Petitioner states that Edisto Beach, in Colleton County, is a small but growing community on the Atlantic Ocean. She submits that the community is both a tourist location and home to the area's fishing fleet. Further, petitioner states that Edisto Beach is relatively isolated and in need of a local aural service to disseminate emergency information and provide local news and public service announcements about community activities. Edisto Beach is incorporated and has a population of 340 persons according to the 1990 U. S. Census.

3. We believe the public interest would be served by proposing the allotment of Channel 229A to Edisto Beach because it could provide the community with its first local FM service. Channel 229A can be allotted to Edisto Beach in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [1] Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Edisto Beach, South Carolina	--	229A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 26, 1991,** and reply comments on or before **August 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Toni T. Rinehart
2557-E Mountain Lodge Circle
Birmingham, Alabama 35216
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 229A at Edisto Beach are North Latitude 32-29-00 and West Longitude 80-19-30.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 90-176

In the Matter of

Amendment of Section 73.202(b), RM-7053
Table of Allotments,
FM Broadcast Stations.
(Columbia, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 3, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 2003 (1990), issued at the request of Eric R. Hilding ("petitioner"), proposing the allotment of FM Channel 255A to Columbia, California, as a first local aural broadcast service. Petitioner filed supporting comments. H Group, Inc. ("HGI") filed comments and a counterproposal seeking the allotment of FM Channel 256A to Arnold, California. [1] Petitioner filed reply comments. No other comments were received.

2. In the *Notice*, petitioner was requested to furnish sufficient information to support a finding that Columbia is a community for allotment purposes since it is not listed in the U.S. Census. Specifically, petitioner was requested to provide information as to the social, economic, cultural or governmental indicia to warrant a clear determination that Columbia is a community for allotment purposes. In response, petitioner states that Columbia is a "restored California 'Gold Rush' mining town", which has a post office, a community college, Chamber of Commerce, and an airport serving local and regional needs. Further, petitioner states that a school, bank, hotel, the "Columbia Historic State Park" and a branch of the California State Docent Society are located in Columbia. Petitioner adds that because Columbia is known for its tourism industry, a first local service could provide an important public communications facility to motorists travelling in that area.

3. Based on the record before us, we are unable to find that Columbia is a "community" for allotment purposes. Columbia is not listed in the U.S. Census, although the *1988 Rand McNally Commercial Atlas* estimates its population as 950. Petitioner provided no information as to the existence of any local government or businesses which identify themselves with Columbia. Petitioner has not shown that the residents of Columbia receive any municipal services, such as police, water, or a library from a local Columbia government. Nor is there any newspaper in Columbia. The existence of a post office and zip code are not sufficient to establish community status. *See Hannibal, Ohio*, MM Docket No. 90-285, 6 FCC Rcd _____ (1991), and cases cited therein. Although petitioner claims that there is a local school and a bank in Columbia, he has not shown that they are intended to serve the community, as opposed to other areas. In the past, the Commission has rejected claims of community status where a connection has not been shown between the political, social and commercial organizations and the community in question. *See, e.g., Greina, Florida*, 6 FCC Rcd 633 (1991), and cases cited therein. Furthermore, petitioner has presented no evidence that residents of Columbia function as and conceive of themselves as residents of a community, around which their interests coalesce. *See Mighty-Mac Broadcasting Co.*, 58 RR 2d 599, 603 (1985); *North Naples, Florida*, 41 RR 2d 1549, 1551 (1977). In view of the foregoing, we find there is an insufficient factual basis to conclude that Columbia is a community for allotment purposes.

4. Accordingly, IT IS ORDERED, That the petition for rule making filed by Eric R. Hilding (RM-7053) to allot FM Channel 255A to Columbia, California, IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] HGI's counterproposal is unacceptable for consideration and therefore was not placed on public notice, since it failed to include a technical showing demonstrating that the requested allotment of Channel 256A at Arnold complies with the Commission's minimum distance separation requirements. The Commission has previously stated that counterproposals must be technically correct and substantially complete when filed in order to afford all parties an opportunity to fully respond in reply comments. *See Eldorado and Lawton, OK*, 5 FCC Rcd 6737 (1990), and cases cited therein.

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 89-517

In the Matter of

Amendment of Section 73.202(b),	RM-6979
Table of Allotments,	
FM Broadcast Stations.	
(Ogelsby, Illinois)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 3, 1991

By the Chief, Allocations Branch:

1. Pursuant to the request of David B. Knoll ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8198 (1989), proposing the allotment of Channel 271A to Ogelsby, Illinois, as that community's first local FM service. Petitioner filed comments restating his intention to apply for the channel. Morrison Broadcast Associates ("Morrison"), permittee of Station WZZT(FM), Channel 236A, Morrison, Illinois, also filed supporting comments.[1]

2. Based on the information before us, we believe that the public interest would be served by allotting Channel 271A to Ogelsby, Illinois, as that community's first local FM service. As stated in the *Notice*, Channel 271A can be allotted to Ogelsby in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 19, 1991** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Ogelsby, Illinois	271A

4. The window period for filing applications will open on **July 22, 1991** and close on **August 21, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Morrison, Illinois, is the subject of a *Notice of Proposed Rule Making*, in MM Docket No 89-521, 4 FCC Rcd 8204 (1989), which proposes to substitute Channel 271A for Channel 236A at the community. In its comments, Morrison states that, in order to resolve the conflict between Morrison and Ogelsby, an extensive study was performed to identify a substitute channel for Ogelsby. No alternate channel was identified that would not require further changes to other allotments and assignments. However, a substitute channel for Morrison was found. Morrison states that Channel 274A can be used at Station WZZT(FM)'s current reference coordinates in compliance with the Commission's separation requirements and would permit Station WZZT(FM) to operate as a full Class A facility. Consequently, Morrison does not object to the Ogelsby allotment, as Channel 274A can be substituted at Morrison in lieu of Channel 271A. We will resolve Morrison's proposal in MM Docket 89-521.

[2] The coordinates for Channel 271A at Ogelsby are North Latitude 41-17-43 and West Longitude 89-03-34. Because this petition was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Channel 271B, Danville, Illinois, at coordinates 40-08-58 and 87-37-35, and Channel 272A, Rochelle, Illinois, at coordinates 41-55-24 and 89-03-30.

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 91-149

In the Matter of

Amendment of Section 73.202(b), RM-7716
Table of Allotments,
FM Broadcast Stations.
(Needles, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 22, 1991; Released: June 3, 1991

Comment Date: July 26, 1991
Reply Comment Date: August 12, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Calnevar Broadcasting, Inc. ("petitioner"), licensee of Station KWAZ(FM), Channel 250C2, Needles, California, seeking the substitution of Channel 250C1 for Channel 250C2 and modification of its license accordingly to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 250C1 if it is allotted to Needles, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 250C1 for Channel 250C2 at Needles since it could provide an enhanced service to the community. Channel 250C1 can be allotted to Needles at the petitioner's specified site, [1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules. However, since Needles is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government in the proposal.

3. Since the petitioner's modification request at Needles, California, conforms with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the license of Station KWAZ(FM) without entertaining competing expressions of interest in the use of Channel 250C1 at Needles, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

City	Channel No. Present	Proposed
Needles, California	250C2	250C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 26, 1991,** and reply comments on or before **August 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Calnevar Broadcasting, Inc.
Attn.: Jack Mathison, President
8448 East Del Norte Court
Scottsdale, AZ 85258

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates at the petitioner's specified site for requested Channel 250C1 at Needles are 35-02-06 and 114-22-09.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-349

In the matter of

Amendment of Part 2 of the rules
concerning the importation of
radio frequency devices capable
of causing harmful interference

REPORT AND ORDER

Adopted: May 1, 1991; Released: June 4, 1991

By the Commission:

INTRODUCTION

1. On July 25, 1989, the Commission adopted a *Notice of Proposed Rule Making* in General Docket 89-349 (NPRM), FCC 89-244, 54 Fed. Reg. 32830 (August 10, 1989), that proposed changes to Part 2 of the Commission's Rules. The NPRM requested comments on the proposed modification of Commission rules pertaining to the importation of radio frequency devices capable of causing harmful interference. The intent of the proposed rule modifications was to update the rules, eliminate burdensome and duplicative government information filing requirements, facilitate the collection of required information through an electronic filing system administered by the U.S. Customs Service (Customs) and to more closely match the Commission's rules with the separate requirements of the Telecommunications Trade Act of 1988, Public Law 100-418, 102 STAT. 1216 (1988), 19 U.S.C. 3101 *et. seq.* Work undertaken by the FCC/Industry Part 68 Ad Hoc Working Group (chaired by GTE Service Corporation) concerning Telecommunications Trade Act criteria has not yet been completed. The Working Group has focused its attention on devices regulated under Part 68 of the rules. Except for cordless telephones and telephone devices incorporating digital microprocessor circuits, Part 68 devices are generally not radio frequency devices capable of causing harmful interference and are not considered as part of this proceeding. Lack of a consensus report from the working group, therefore, does not affect this action to revise and update the Part 2 rules.

2. We have analyzed all of the comments and reply comments submitted in response to the NPRM and have reviewed each of our proposals as set forth in the NPRM. This analysis has shown, as discussed below, that the public interest will best be served by adopting the proposals as set forth in the NPRM, with certain amendments to remove ambiguities pointed out in the comments and reply comments. The revised order of the rules adopted is such that the rules are organized in a more straightforward manner and stated concisely.

BACKGROUND

3. The rules pertaining to the importation of radio frequency devices were established in December of 1975 in cooperation with Customs. The rules are intended to keep imported devices which do not comply with our technical requirements from being distributed within the United States, thereby reducing the potential for harmful interference being caused to authorized radio communications users. Control of imported radio frequency devices requires the completion of the Form 740 by the importer or consignee to declare that the devices imported are, in fact, in compliance with the Commission's technical requirements. Additional data is required to allow the devices to be screened for compliance.

4. Since adoption of the original rules in 1975, we have observed numerous changes in the importation industry, changes that have prompted us to consider these rule modifications. The increase in the number of forms filed, from 3,000 per month in 1977 to over 40,000 per month in 1990, indicates a definite need for automation. Our experience in administering these rules over the last fifteen years has pointed out areas where the rules can be relaxed or clarified. Changes are also needed to facilitate the reporting requirement placed on Customs under the Telecommunications Trade Act of 1988. Finally, Customs has informally requested Commission assistance in the implementation of the Customs paperless importation system. In order to assist Customs, we will allow FCC required importation information to be filed by electronic means.

DISCUSSION

5. The Commission proposed an electronic filing system to replace the paper FCC Form 740 (NPRM, paragraph 10). This proposal is based on Customs' desire to automate its importation entry process with a goal of elimination of unnecessary paperwork to the greatest extent possible. In this effort Customs has informally requested that the Commission facilitate the filing of FCC Form 740 information electronically. In return Customs has agreed to gather FCC specified information and to make this information available to the Commission. This is a mutually beneficial approach because much of the Form 740 information is already collected on Customs Form 3461 (Entry/Immediate Delivery) and Customs Form 7501 (Entry Summary).

6. Ten of 13 comments and reply comments[1] support conversion to electronic filing of Form 740 information. There were no comments made in opposition to this conversion. Electronic filing will speed the process of bringing imported goods into the United States and will reduce the paper processing experienced by the importers. These are Customs' goals and we are modifying our rules to provide for electronic processing.

7. The Customs electronic processing system will not be ready for at least a year. Many details must be worked out before initiating electronic filing of FCC required information. Recognizing this, the Commission is structuring its rules to accommodate both the existing paper system and the future electronic filing system. To facilitate the conversion to electronic filing, the rules will permit electronic filing at any and all points of entry where the Customs electronic system is or may become available.

We adopt this approach because Customs is likely to phase in its new system instead of implementing it at each point of entry simultaneously.

8. The Commission also proposed deleting components and subassemblies from the import rules. Interference is caused by completed devices, not by components or subassemblies. Existing rules requiring import declarations for subassemblies were adopted at a time when the largest portion of radio frequency devices was made up of radio transmitters or receivers. At that time devices were being imported that, for all intents and purposes, were operational and capable of causing interference as imported. Only minor, primarily cosmetic, final touches were required before marketing. With advances in technology, especially in microprocessor and digital design, the electronics industry now uses the term subassembly to describe integral portions of devices that, until they are integrated with other such devices, cannot be operated. In industry usage the term subassembly no longer applies to a device that can be operated and requires only cosmetic finishing to be complete. We agree with the industry use of the term subassembly and accept it to mean assemblies of components that cannot be operated unless they are combined with or included in other assemblies of components in such a manner as to constitute a completed device. Completed devices, not subassemblies, are capable of being energized and becoming sources of radio frequency energy. Completed devices, whether manufactured with US or non-US produced components and subassemblies, are subject to the radiated and conducted emissions limits in Part 15 of the Commission's rules and are subject to certain marketing constraints contained in Subpart I of Part 2 of the Rules, 47 C.F.R. §§2.801-2.815 (1989). We will continue to rely on our marketing enforcement program to detect and curtail the assembly (manufacture), sale and use of non-compliant devices, whether manufactured from US produced or from non-US produced (imported) subassemblies. MST expressed concern about central processing units (computer CPU boards) sold without enclosures and power supplies, suggesting that such units should be treated as though they were completed devices subject to Form 740 filing requirements. MST suggested that an increase in interference potential might exist if large numbers of such units were to become available to the public. We believe that any incomplete devices purchased by individuals will be in such relatively small quantities that no appreciable increase in interference potential will occur. MST also suggested that the Commission "periodically reexamine the definition of subassembly to ensure that it has not become too broad." Such a reexamination is a natural part of our import review program and will be facilitated by the conversion to electronic filing. Because of existing FCC equipment authorization requirements and the marketing and importation enforcement activities (under Parts 2 and 15), we see no impediment to adoption of the proposed rule. Our analysis of the technological changes leading to the re-definition of the term "subassembly" indicates that the relaxation of this filing requirement will not lead to an increased potential for radio frequency interference. Deletion of this filing requirement will reduce the burden of both government and industry by an estimated 40% without increasing the potential for radio frequency interference. We are deleting the requirement to file Form 740 or Form 740 information for importation of components and subassemblies of radio frequency devices from the import rules so long as they do not constitute essentially completed devices.

9. The Computer and Business Equipment Manufacturers Association (CBEMA) raised a concern about the apparent ambiguity of the phrase "essentially completed device."[2] The phrase "essentially completed device" is intended to mean a product or device that is "capable of operation" rather than one requiring additional assembly or manufacture. The act of combining a computer "mother board" and a computer power supply is part of the manufacture of a computing device. Marketing of completed radio frequency devices manufactured in the United States is regulated under Part 2, Subpart I of the Rules and in particular §2.803. Form 740 or Form 740 information will not be required for computer circuit boards or power supplies defined in §15.101(e) as subassemblies. Form 740 information will be required to be submitted for computer circuit boards that are actually peripheral devices as defined in Section 15.3(r) of the rules and for all devices that, by themselves, are subject to FCC marketing rules.

10. The NPRM proposed expanding the number of devices exempted from the Form 740 filing requirements. Amended rule §2.1202 lists exempted devices. The expansion recognizes that devices that are acceptable for marketing and use in the United States should not have to undergo additional scrutiny if they are shipped out of the country and brought back into the country without modification. The amended rule will exempt devices manufactured or assembled in the U.S.A. that have been taken out of the country and then returned to the United States without modification or further assembly from import declaration requirements. This provision also applies to devices that are properly imported, exported for repair and re-imported for use. Devices imported solely for export are not exempted. However, it is not our intent to prevent the import of devices for subsequent export if they cannot reasonably be used in the United States, such as televisions designed to receive signals using European transmission standards. We adopt new Section 2.1204(a)(5) to allow entry of devices for export, provided they are never marketed for use in the U.S.A.

11. The Commission proposed to specifically allow Form 740 information to be provided by customs brokers as well as importers or consignees. Existing rules specifically require import declarations to be made by importers or consignees. As a practical matter, import brokers, not importers or ultimate consignees, prepare and submit most of the required declarations. The proposed change is being adopted to recognize this common industry practice.

12. The Commission proposed that importers be required to document how an imported radio frequency device was determined to be in compliance with Commission technical standards for a one year period following the date of entry. The Commission is adopting this proposal, taking into account CBEMA's suggestion that the wording in the proposed rule be improved for clarity. [3] The proposed rule would require importers, consignees or brokers to retain documentation of their compliance procedures for each device for at least one year from date of entry in order to respond to Commission requests to review those procedures for any specific entry. Upon request for documentation, the Commission will allow 30 days for reply.

13. After Customs' electronic filing system is implemented, importers will file the required FCC declarations electronically with Customs. Importers filing electronically with Customs will not be required to file paper Form 740 documents with the FCC. If an importer is unable to participate in the electronic filing system, declarations may be filed with the Commission on the FCC Form 740. Much of the Form 740 information is already required for Customs purposes. Additional information to be submitted electronically will specifically include the import condition, FCC identifier (if appropriate), a count of the number of devices imported and a commercial product description. All of these items are required on the existing Form 740. We note that the quantity of devices imported must be the total number of devices, not the number of crates, boxes, pallets, truck loads or other "unit" specified in the Harmonized Tariff Schedule of the United States. The commercial product description is shown on the existing Form 740 as "Description of Equipment." The proposed rule would require three elements in the product description; trade name, model/type name or number, AND additional descriptive information to help identify the device. We are adopting the proposed rule.

14. Several commenters opposed our proposal to prohibit importation of devices while a grant of equipment authorization is pending.[4] Most assert that requiring companies to wait for a grant from the Commission before bringing a new product into the country will create an unfair competitive disadvantage against them. They argue that they will not be able to "pre-position" production runs of devices at distributer or retail levels while waiting for an FCC grant.[5] Existing rules allow import pending FCC grant of authorization. In practice such devices actually reach distribution and retail outlets prior to grant. This occurs because the devices are released from Customs bond once duties are paid, regardless of equipment authorization status. The high volume of imports in general prevents customs from maintaining RF devices under bond pending FCC grant of equipment authorization. This is why, as discussed in the NPRM, Customs procedures do not accommodate importation under bond pending FCC approval as described in existing Section 2.1219(b). Under these circumstances, devices that do not comply with FCC equipment standards can too easily enter into the marketplace once they are imported. Our experience with enforcing marketing rules has shown that many companies consider the potential for economic gain by selling non-compliant devices to far outweigh the risk of monetary forfeiture or other enforcement action once the devices gain entry, especially when faced with the cost and inconvenience of modifying the products or returning them to the point of origin. We conclude that it is in the interest of the public to deny entry of such devices unless and until the proper Commission equipment authorization has been issued or compliance with applicable FCC rules achieved.

15. The proposed rules delete all FCC requirements for import bonds. Our experience over the last fifteen years has shown that import bonds on radio frequency devices have not been used except by Customs for Customs purposes. This action does away with an unnecessary requirement in the rules. There were no comments filed in opposition to this change.

16. The proposed rules would continue to allow certain devices to be imported in limited quantities for test, evaluation or demonstration purposes. The phrase "limited quantities" concerned some commenters. CBEMA suggested that we ". . . define the factors . . ." that might be considered by a company (importer) when deciding how many devices to import under the "limited quantities" provision. CBEMA also suggested that the size of a particular commercial operation should be a factor since larger operations would require larger "limited quantities". Motorola suggested that "limited quantities" be defined as ten devices. XEROX suggested the phrase "quantities sufficient to allow evaluation, testing or demonstration." The purpose of the rule is to allow importation of a sufficient number of units so that a new device or a new model of a device may be evaluated for FCC compliance (through testing) or for marketability (i.e. trade show displays or marketing studies). We believe that an import limit of ten devices is reasonable. We agree, however, that circumstances may arise in which the importation of larger "limited quantities" under this rule may be desired. In such cases, the importer must contact the FCC for written approval prior to importation. We are adopting the rule modified to set the upper limit of "limited quantities" to be ten devices unless prior written approval is received from the FCC office responsible for imports.

17. The Commission proposed allowing up to three unintentional radiators (ex. computers and computer peripherals) to be imported for the importer's or consignee's personal use. The existing rule specifically allows only receivers. This change, which we adopt, will update the rules to be more consistent with current technology. Personal use continues to mean that the devices imported under this rule will not be offered for sale or otherwise marketed in the United States.

18. Although not proposed as a rule change, several commenters challenged our practice of making all Form 740 information available for public inspection.[6] They argue that since non-FCC import information collected by Customs is not routinely available for public inspection, FCC import information collected by Customs (or the FCC) should not be routinely available for public inspection. Some commenters asked that all Form 740 information be withheld from public availability. Others suggested that certain data elements be withheld. Comments indicate that the number of requests to view data will likely increase since data in electronic form is more easily and efficiently reviewed than existing paper files. Existing rule §0.459 provides that certain information on file with the FCC may be protected, upon a party's request, from public disclosure. The comments also indicate that many importers will request certain data to be withheld under Section 0.459. We will continue our current practice of making all Form 740 information available to the public. We will continue this practice as we migrate to Customs' electronic filing system. An importer who desires information withheld from public inspection can apply for protection under Section 0.459 of the Commission's rules.

19. The American Electronics Association submitted comments recommending alternate methods of conducting an import controls program. The implementation of any or all of the recommendations would require an additional level of FCC administration, tracking and review. Specifically, AEA has recommended (1) a blanket

approach to filing FCC Form 740, (2) a "self-certification" of compliance by importers and (3) creation of a Certified Importer's License.

20. We conclude that the establishment of a blanket approach is not appropriate. Ultimately electronic filing will eliminate the need for all but a few Form 740 documents. Most import data will then be submitted to Customs electronically. A blanket approval would require that both FCC and Customs maintain blanket lists submitted by each company or importer. This would potentially require maintenance of literally hundreds of lists. To be effective the lists would have to be updated continuously - a task neither Customs nor the FCC is staffed or funded to do. In addition, for electronic filing to be useful, the products described on the numerous blanket lists would have to be entered into the FCC imports database. The benefits of such an undertaking can be realized in the proposed electronic filing system at much less cost in the terms of staffing, funding and time delays. A blanket Form 740 for all items on an entry accompanied by a list of devices in the entry poses the same cross-referencing burden and is not readily adaptable for key entry into the electronic filing system. In view of the benefits of electronic filing and the extra burden of the blanket approach presented, such a blanket approach is not being adopted.

21. The AEA proposal for "self-certification" is essentially what is done in filing Form 740 information. The importer, consignee or broker issues a declaration identifying the category of the covered devices on the entry. Follow-up action by the Commission will provide quality control and review. Similarly, the benefits suggested by the creation of a Certified Importer's License will be recognized once electronic filing becomes a reality. Neither the "self-certification" proposal nor the creation of an Importer's License provide improvement over the electronic filing goal of the modified rules being adopted.

ADOPTED REGULATION

22. Part of the effect of these rule modifications will be to reduce the filing burden on the import industry at large, to require some potentially new record keeping by importers and to significantly reduce the time and effort required for importers to make the required filings. The estimated 40% reduction in filings due to the elimination of filing requirements for components and subassemblies will benefit almost all parties involved. The requirement to maintain documentation of methods of determining FCC compliance of imported devices may impose an additional burden. There were no comments filed challenging this requirement or indicating that it would impose a substantial burden. In addition, an ex parte presentation by AEA indicated that many importers already maintain such records for their own purposes. While this requirement may impose an additional burden on some importers, most will not experience an additional work load. Finally, once electronic filing is implemented, those participating will experience a significant reduction in workload from an estimated five minutes preparation/submission time per submission to approximately three minutes per submission, or a productivity increase from 12 submissions per hour to 20 submissions per hour. This improvement is due primarily to the benefits of automation and to the fact that much of the FCC required data is already collected by Customs for Customs purposes. The change to electronic filing will remove the need for importers to file duplicative information with two government agencies. Overall, both industry and government will experience a reduction in workload and an improvement in efficiency.

23. In addition to a reduction in the workload of both industry and the government, the change to electronic filing will enhance the ability of the FCC to enforce the rules pertaining to importation of radio frequency devices. Enforcement personnel will be able to review filings by specific companies, filings by device type, filings by FCC ID number and numerous combinations of these and other data fields. Once electronic filing is implemented and the increased ability and activity of FCC enforcement efforts is known, we expect that compliance with the importation rules will increase and that the number of imported non-compliant RF devices now marketed will decrease.

24. We are altering our program of importation controls of radio frequency devices essentially as proposed in the NRPM. A re-ordering and re-numbering of the rules from those proposed has resulted in a more concise and clear statement of the requirements. Deletion of the filing requirement for subassemblies and the ultimate conversion to an electronic system of filing Form 740 information will allow more efficient use of resources by both industry and the government. The requirement for submission of additional documentation in response to specific requests by the Commission will allow for quality control of the importation process while lessening the burden on both the industry and the government. Some of the changes that were made to the proposed rules were done for purposes of clarifying the intent of the rules proposed in the NPRM. Specifics of the electronic filing process will be addressed as Customs continues the development of its electronic filing system. The policy of releasing Form 740 information to the public will remain unchanged.

REGULATORY FLEXIBILITY FINAL ANALYSIS

25. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This action is taken to update rules established in 1975 and to eliminate burdensome and duplicative government information filing requirements.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no issues raised in the public comments in response to the initial analysis.

III. Significant alternatives considered and rejected:

Alternatives considered included use of a "Blanket Form 740," self-certification by importers and creation of a new "Certified Importer's License." Each of these options either were substantially contained in the proposed rules or would involve dramatic increases in demand on government resources, and were, therefore, rejected.

PAPERWORK REDUCTION ACT STATEMENT

26. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection burden on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that under the authority contained in Section 4(i) and 302(a) of the Communications Act of 1934, as amended, Part 2 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix B. These rules and regulations are effective **July 15, 1991.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments were filed by:

Rockwell International Corporation (Rockwell)

Xerox Corporation (Xerox)

Thomson Consumer Electronics (TCE)

International Business Machines Corporation (IBM)

Tandy Corporation (Tandy)

Compaq Computer Corporation (Compaq)

Computer and Business Equipment Manufacturers Association (CBEMA)

GTE Service Corporation (GTE)

Consumer Electronics Group of the Electronic Industries Association (EIA/CEG)

Motorola Inc.

The International Trade Facilitation Council (NCITD)

American Electronics Association (AEA)

Reply Comments were filed by:

Tandy Corporation

Maximum Service Telecasters (MST)

Motorola Inc.

American Electronics Association (AEA)

APPENDIX B

Part 2 of Title 47 of the CFR is amended as follows:

1. The authority citation for Part 2 is revised to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.1201 is amended by revising paragraph (b), removing the note following paragraph (b), and removing paragraph (c) to read as follows:

§ 2.1201 Purpose.

* * * * *

(b) The rules in this subpart set out the conditions under which radio frequency devices as defined in §2.801 that are capable of causing harmful interference to radio communications may be imported into the U.S.A.

3. Section 2.1202 is revised in its entirety to read as follows:

§ 2.1202 Exclusions.

The provisions of this subpart do not apply to the importation of:

(a) Cameras, musical greeting cards, quartz watches and clocks, modules of quartz watches and clocks, hand-held calculators and electronic games, and other similar unintentional radiators which utilize low level battery power and which do not contain provisions for operation while connected to AC power lines.

(b) Unintentional radiators which are exempted from technical standards and other requirements as specified in §15.103.

(c) Radio frequency devices manufactured and assembled in the U.S.A. that meet applicable FCC technical standards and which have not been modified or received further assembly.

(d) Radio frequency devices previously properly imported that have been exported for repair and re-imported for use.

(e) Subassemblies, parts, or components of radio frequency devices unless they constitute an essentially completed device which requires only the addition of cabinets, knobs, speakers, or similar minor attachments before marketing or use. Form 740 information will be required to be submitted for computer circuit boards that are actually peripheral devices as defined in §15.3(r) of the rules and all devices that, by themselves, are subject to FCC marketing rules.

4. Section 2.1203 is revised in its entirety to read as follows:

§ 2.1203 General requirement for entry into the U.S.A.

(a) No radio frequency device may be imported into the Customs territory of the United States unless the importer or ultimate consignee, or their designated customs broker, declares that the device meets one of the conditions for entry set out in this subpart.

(b) A separate declaration shall be used for each line item in the entry or entry summary containing an RF device, or for each different radio frequency device within a line item when the elements of the declaration are not identical.

(c) Failure to properly declare the importation category for an entry of radio frequency devices may result in refused entry, refused withdrawal for consumption, required redelivery to the Customs port, and other administrative, civil and criminal remedies provided by law.

(d) Whoever makes a declaration pursuant to §2.1203 (a) must provide, upon request made within one year of the date of entry, documentation on how an imported radio frequency device was determined to be in compliance with Commission requirements.

5. Section 2.1204 is added to read as follows:

§ 2.1204 Import Conditions.

(a) Radio frequency devices may be imported only if one or more of these conditions are met:

(1) The radio frequency device has been issued an equipment authorization by the FCC.

(2) The radio frequency device is not required to have an equipment authorization and the device complies with FCC technical administrative regulations.

(3) The radio frequency device is being imported in limited quantities for testing and evaluation to determine compliance with the FCC Rules and Regulations or suitability for marketing. The device will not be offered for sale or marketed. The phrase "limited quantities" means ten or fewer units. Prior to importation of more than ten units, written approval must be obtained from the Chief, Enforcement Division, Field Operations Bureau, FCC.

(4) The radio frequency device is being imported in limited quantities for demonstration at industry trade shows and the device will not be offered for sale or marketed.

(5) The radio frequency device is being imported solely for export. The device will not be marketed or offered for sale for use in the U.S.

(6) The radio frequency device is being imported for use exclusively by the U.S. Government.

(7) Three or fewer radio receivers, computers, or other unintentional radiators as defined in Part 15 of this chapter, are being imported for the individual's personal use and are not intended for sale.

(8) The radio frequency device is being imported for repair and will not be offered for sale or marketed.

(b) The ultimate consignee must be able to document compliance with the selected import condition and the basis for determining the import condition applied.

6. Section 2.1205 is revised in its entirety to read as follows:

§ 2.1205 Filing of required declaration:

NOTE: The U.S. Customs Service is implementing a paperless entry system. Until the Customs electronic system is operational, submit the required declaration following the guidelines in paragraph (a) below. When the Customs system is implemented, follow the guidelines in paragraph (b).

(a) For points of entry where electronic filing with Customs has not been implemented, use FCC Form 740 to provide the needed information and declarations.

(1) Mail the original of FCC Form 740 to:

FCC
Washington, DC 20554
Attention: Imports

on or before the date the Customs entry papers are filed.

(2) Attach a copy of FCC Form 740 to the Customs entry papers.

(b) (1) For points of entry where electronic filing with Customs is available, submit the following information to Customs when filing the entry documentation and the entry summary documentation electronically. Follow procedures established by Customs for electronic filing.

(i) The terms under which the device is being imported, as indicated by citing the import condition number specified in §2.1204(a).

(ii) The FCC identifier as specified in §2.925, if the device has been granted an equipment authorization;

(iii) The quantity of devices being imported, regardless of what unit is specified in the Harmonized Tariff Schedule of the United States; and

(iv) A commercial product description which is to include the trade name, a model/type number (or model/type name) and other descriptive information about the device being imported.

(2) For importers unable to participate in the electronic filing process with Customs for good cause, declarations are to be made in accordance with paragraph (a) of this section.

7. Section 2.1207 is revised in its entirety to read as follows:

§ 2.1207 Examination of imported equipment.

In order to determine compliance with its regulations, Commission representatives may examine or test any radio frequency device that is imported. If such radio fre-

quency device has already entered the U.S., the ultimate consignee or subsequent owners of that device must, upon request, made within one year of the date of entry, make that device available for examination or testing by the Commission.

8. Sections 2.1209, 2.1211, 2.1213, 2.1215 and 2.1219 are removed.

FOOTNOTES

[1] Motorola, the Association of Maximum Service Telecasters (MST) and the American Electronic Association (AEA) did not specifically comment on the change to electronic filing.

[2] *See* CBEMA at item 5, page 4

[3] *See* CBEMA at item 4.

[4] IBM, Tandy, Compaq, CBEMA and EIA opposed. Motorola and MST supported. Others responding did not comment on this item.

[5] Existing §2.803 prohibits these practices and "staging" of new devices is a violation of the rules.

[6] IBM, Tandy, Compaq, and CBEMA desire to withhold part or all of FCC import data. Motorola desires making all such information routinely available.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE CO.

NEW ENGLAND TELEPHONE
AND TELEGRAPH CO.

Apparent Violations of the
Commission's Rules and Policies
Governing Transactions
with Affiliates

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: May 21, 1991; Released: June 4, 1991

By the Commission:

I. INTRODUCTION

1. In the *NYNEX Consent Decree Order*,[1] released October 4, 1990, this Commission adopted a consent decree which concluded an enforcement proceeding involving New York Telephone Co. and New England Telephone and Telegraph Co. (the "NYNEX Telephone Companies" or "NTCs"). That proceeding, which we initiated in February 1990, concerned apparent violations by the NYNEX Telephone Companies of Commission rules governing transactions between regulated telephone companies and their nonregulated affiliates.[2] By separate petitions filed November 2 and 5, 1990, Allnet Communication Services, Inc. ("Allnet"), the Attorney General of the State of New York and the New York State Consumer Protection Board ("New York"), and Scott J. Rafferty ("Rafferty") (collectively, "petitioners") request that we reconsider the *NYNEX Consent Decree Order*. Petitioners urge us to set aside the consent decree and reopen the enforcement proceeding against the NYNEX Telephone Companies. The NTCs opposed the petitions for reconsideration, [3] and Allnet and New York replied to the NTCs' opposition. For the reasons discussed below, we deny the petitions for reconsideration.

II. BACKGROUND

2. The *Order to Show Cause*,[4] released February 8, 1990, was based on the results of a Common Carrier Bureau ("Bureau") audit of transactions between the NTCs and their nonregulated corporate affiliate, NYNEX Materiel Enterprises Co. ("MECO"). In the *Order to Show Cause*, we advised the NYNEX Telephone Companies that they apparently had violated the Commission's affiliate transaction and other accounting rules in connection with their accounting of purchases of goods and services from MECO. We tentatively concluded that MECO had charged the NTCs excessive prices for goods and services over a five-year period from 1984 through 1988. We observed that the NTCs, in turn, recorded MECO's full charges on the carriers' regulated books for ratemaking purposes in apparent violation of our rules, thereby imposing unwarranted costs on interstate consumers. We quantified MECO's apparently excessive charges to the carriers by computing the difference between the NTCs' authorized rate of return and MECO's realized return on investment on sales to the NTCs.

3. Based on those tentative conclusions and calculations, the *Order to Show Cause* outlined our proposed regulatory response, which would have required the NTCs to:

> (1) reduce their capital accounts by $32.6 million to eliminate apparently excessive MECO charges remaining in those accounts;
>
> (2) file revised access tariffs reflecting a one-time reduction to interstate revenue requirements of $35.5 million, to return apparent overcharges imposed on interstate consumers in prior years;
>
> (3) make corresponding adjustments to their Annual Reports Form M to reflect the proposed accounting and ratemaking adjustments; and
>
> (4) forfeit $1.419 million ($709,500 per carrier) to the United States, pursuant to Section 220(d) of the Communications Act, for apparent violations of the Commission's affiliate transaction and other accounting rules.

The *Order to Show Cause* directed the carriers to respond within thirty days to these proposed accounting and ratemaking remedies, as well as the proposed forfeitures for apparent accounting rules violations. The NTCs responded on March 12, 1990, contesting the Commission's proposed enforcement action.

4. Subsequently, the Commission and the NTCs entered into discussions directed toward achieving a negotiated settlement to the controversy. This effort culminated on October 4, 1990, with the release of the *NYNEX Consent Decree Order*, whereby we adopted a consent decree negotiated between the Commission and the NTCs which concluded the enforcement proceeding against the carriers. The consent decree required the NTCs to: (1) reduce capital accounts by $32.6 million; (2) file revised access tariffs reflecting reductions of $35.5 million to their interstate revenue requirements; and (3) make corresponding adjustments to their 1990 Annual Reports Form M. In addition, the NTCs agreed to make a $1.419 million voluntary contribution ($709,500 per carrier) to the United States Treasury. The NTCs' obligations under the consent decree thus tracked precisely the remedies proposed in the *Order to Show Cause*, with the exception that the $1.419 million payment was a voluntary contribution rather than a forfeiture. The NTCs also expressly waived any rights to appeal the consent decree.

5. The consent decree by its terms did not adjudicate factual or legal issues raised by the *Order to Show Cause* or the NTCs' responsive pleading. Moreover, the Commission agreed to terminate the enforcement proceeding without finding that the NTCs had violated Commission rules. The Commission further agreed not to initiate fu-

ture enforcement proceedings against the NTCs based on the facts which led to the release of the *Order to Show Cause* and the subsequently negotiated consent decree.

6. Allnet, New York, and Rafferty subsequently filed these petitions for reconsideration of the *NYNEX Consent Decree Order*. Petitioners allege procedural infirmities in our adoption of the consent decree and termination of the enforcement proceeding, and argue that the consent decree prejudices the rights of private persons. In addition, petitioners criticize the scope of our examination of transactions between the NTCs and MECO, and fault the methodology we employed to calculate the impact of MECO's charges to the NTCs on ratepayers. Accordingly, petitioners urge us to repudiate the consent decree and reopen the enforcement proceeding against the NTCs.

III. DISCUSSION

A. Timeliness of Petitioners' Participation in this Proceeding

7. At the outset, we address the NTCs' assertion that the petitions for reconsideration are procedurally defective. Section 1.106(b)(1) of our rules states, *inter alia*, that a petition for reconsideration filed by a person who is not a party to the proceeding "shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."[5] The NTCs maintain that petitioners have failed to satisfy this threshold pleading requirement, and therefore urge us to dismiss the petitions as untimely.[6]

8. Initially, we note that one of the three petitioners, Rafferty, did participate earlier in this proceeding; therefore, the "good reason" pleading requirement of Section 1.106(b)(1) does not apply and his petition is properly before us for consideration. New York asserts in its petition that it could not participate earlier because the Commission did not seek public comment, and because formal intervention under Section 1.223 of the rules was unavailable as the Commission did not designate a hearing.[8] Contrary to New York's assertion, however, prior participation was not foreclosed simply because we did not seek comment or designate a hearing in this proceeding. Section 1.41 of our rules[9] permits informal pleadings in instances such as this. Rafferty invoked this rule to participate earlier in this proceeding; New York and Allnet were free to do the same. In its reply, New York suggests that it could not have participated earlier because its petition is based on evidence that was not fully developed or was otherwise unavailable for public disclosure until recently.[10] Although not dispositive of the issue, New York's reply provides somewhat more support for its argument that it was unable to participate earlier in this proceeding.

9. Allnet fails to address the "good reason" pleading requirement in its petition. In reply, however, Allnet asserts that earlier participation would have been impossible given the relief sought in its petition (*i.e.*, outright reversal of the consent decree or a narrowing of its terms). Allnet also appears to suggest that it could not foresee that its rights potentially might be affected by the outcome of the enforcement proceeding against the NTCs.[11] Allnet's *post hoc* assertions, however, do not excuse its failure to participate earlier in this proceeding. Allnet plainly was aware of the existence and scope of the *Order to Show Cause* well before we issued the *NYNEX Consent Decree Order*,[12] and should have recognized that resolution of the enforcement action could affect the interests of the NTCs' interstate consumers. Allnet, however, did not at any time attempt to participate or advise the Commission of its interest in this proceeding prior to reconsideration. Instead, Allnet elected to await Commission action, and now belatedly attempts to assert its interests. Moreover, the relief sought in its petition has no bearing on Allnet's opportunity under our rules to participate in this proceeding prior to adoption of the consent decree and termination of the enforcement action. We conclude that Allnet has not shown good reason why it was unable to participate at earlier stages in this proceeding. Therefore, Allnet's petition for reconsideration is not consistent with Section 1.106(b)(1) of our rules.[13]

10. However, while Allnet's petition is inconsistent with Section 1.106(b)(1), and New York's "good reason" showing is somewhat tenuous, we decline to dismiss the petitions on procedural grounds. We believe the public interest would best be served by exercising our discretion to address petitioners' claims and clarify our action in this proceeding. Moreover, Rafferty's petition, which is properly before us, raises issues common to all three petitions for reconsideration. In light of these factors, we shall reach the merits of petitioners' claims.

B. Reasons for Adopting the Consent Decree

11. Allnet and New York assert that the *NYNEX Consent Decree Order* is arbitrary and capricious because that *Order* did not provide an adequate explanation of our reasons for adopting the consent decree and ending the enforcement proceeding.[14] The NTCs respond that an agency's decision to settle a dispute through a consent agreement is not subject to the same requirements concerning record support as an agency's decision derived from a completed adjudication on the merits.[15]

12. While the *NYNEX Consent Decree Order* did not offer a detailed statement of our reasons for electing to enter into the settlement agreement, the consent decree by its terms secured for interstate consumers the full measure of relief proposed in the *Order to Show Cause*. Moreover, it foreclosed any appellate challenge by the NTCs. Under these circumstances, the public interest benefits advanced by the consent decree are self-evident. However, to address petitioners' concerns and to avoid any misunderstanding concerning our action, we take this opportunity on reconsideration to state in more detail our reasons for entering into the consent decree.

13. Significantly, the consent decree offered certainty of relief for consumers. The NTCs had mounted a vigorous attack on the Commission's authority to require the revenue requirement reductions and forfeitures proposed in the *Order to Show Cause*. Any final order on the merits affirming the proposed remedies contained in the *Order to Show Cause* would almost certainly have elicited an appellate challenge by the NTCs, thereby delaying indefinitely any benefits to interstate consumers.[16] In contrast, under the terms of the consent decree the NTCs agreed to implement remedial measures virtually identical to those proposed in the *Order to Show Cause*, while waiving their rights to appeal the terms of the settlement agreement. Thus, the consent decree obtained immediate benefits for consumers while avoiding the delay, expense, and uncertainty that attends protracted litigation.

14. Moreover, the relief obtained by the consent decree was for all practical purposes the same as that which could have been obtained by a final order affirming the remedies proposed in the *Order to Show Cause*. Under the consent decree, the NTCs agreed to make accounting and ratemaking adjustments precisely as proposed by the *Order to Show Cause*; the carriers also agreed to make a $1.419 million voluntary payment to the United States Treasury in lieu of a forfeiture of the same amount. Thus, the requirements of the consent decree matched dollar-for-dollar the proposed remedies outlined in the *Order to Show Cause*. Had we adjudicated this matter on the merits, resolved all issues of fact and law against the NTCs, and imposed the maximum remedies available under the *Order to Show Cause*, the ultimate relief obtained for consumers would not have differed materially from that obtained by the consent decree.[17]

15. Ultimately, our decision to enter into a consent decree in a proceeding such as this is simply an exercise of our enforcement discretion under the Communications Act. We must decide how best to allocate our finite resources to protect the interests of consumers and enforce the statute, given such considerations as the merits of each individual case, the difficulties inherent in any administrative enforcement proceeding, and the uncertainty and delay associated with potential appellate litigation. In this proceeding, the two major factors described in the preceding paragraphs -- the certainty of relief for consumers, and the practical equivalence of relief under the consent decree or a full adjudication on the merits -- counseled strongly in favor of settlement. Moreover, adopting the consent decree and terminating this proceeding enabled us to apply our resources to other areas of enforcement concern. Under these circumstances, we concluded -- and still firmly believe -- that adoption of the consent decree clearly served the public interest and was well within our discretion.

C. Public Notice and Comment Concerning the Consent Decree

16. Allnet also maintains that the *NYNEX Consent Decree Order* violates the Administrative Procedure Act ("APA") because interested persons were not permitted to comment on the consent decree before its adoption.[18] Allnet further asserts that "[a]ny consideration of a Consent Decree must be done on the record, with a full opportunity for public comment on both the Consent Decree and all of the underlying information upon which the Commission will make its determination."[19] The NTCs respond that Allnet's assertions are not supported by law.[20]

17. Significantly, Allnet cites no specific provision of the APA or any case law which requires notice and comment procedures during an agency's consideration of a consent decree in an administrative enforcement proceeding. Nothing in the APA, the Communications Act, or our rules requires the Commission to place proposed consent decrees on public notice prior to adoption. In our view, notice and comment procedures are not required in the context of an administrative enforcement proceeding oriented against one party.[21] Accordingly, we reject Allnet's unsupported assertions concerning the need for public participation in the adoption of the consent decree in this proceeding.

D. Ex Parte Considerations

18. We next address Allnet's assertion that we violated our *ex parte* rules in negotiating the consent decree with the NTCs. Allnet maintains that the settlement discussions between the NTCs and the Commission violated the prohibition against *ex parte* communications in restricted Commission proceedings.[22]

19. Allnet's argument that the negotiation leading to the consent decree violated the *ex parte* rules is wrong. This proceeding became restricted upon the filing of Rafferty's March 14 motion requesting that the Commission, *inter alia*, "Affirm NYNEX's Liability for Forfeitures."[23] Accordingly, *ex parte* presentations were generally prohibited by Section 1.1208(a) of the rules during the period in which the consent decree was negotiated.[24] The discussions at issue here, however, were exempted by Section 1.1204(b)(7) of the rules, which exempts presentations "requested by the Commission or staff for the clarification or adduction of evidence or for resolution of issues," unless the proceeding has been designated for hearing.[25] The Commission explained in proposing this exemption that its purpose was, in part, to avoid "constraints upon agency staff in . . . attempting to reach settlement agreements . . . ."[26] The settlement discussions here were initiated by Commission staff for the purpose of resolving, *i.e.*, settling, the issues raised by the *Order to Show Cause*. Specifically, staff sought to determine whether the NTCs would be interested in such a consent decree and whether mutually agreeable terms could be drafted. Such discussions were conducted pursuant to, and fell squarely within, the "resolution of issues" exemption.

20. Having determined that the settlement discussions were permissible under the *ex parte* rules, the next question is whether they were required to be disclosed. The Note following Section 1.1204(b)(7) provides that any "new written information" or "new oral information" resulting from presentations in a restricted proceeding exempted thereunder shall be disclosed. The Note's history makes clear that the term "new information" was intended to refer only to new facts or arguments not already reflected in the pleadings, using the same "permit but disclose" standard that applies in informal Rule Making proceedings.[27]

21. During the settlement discussions in this case, the NTCs did not present any such new facts or arguments regarding their position on the issues raised by the *Order to Show Cause*. Rather, as noted above, the settlement discussions were limited to whether the NTCs were interested in a consent decree and bargaining over the precise contents and wording of any such consent decree. Thus, contrary to Allnet's argument,[28] no other party (*i.e.*, Rafferty) or non-party was denied an opportunity to rebut any factual representations by the NTCs, as there were no such representations in the settlement discussions.[29] Moreover, again contrary to Allnet's suggestion,[30] the discussions in no way addressed Allnet's pending complaint. In these circumstances, no disclosure was required by the *ex parte* rules.

E. Rate of Return Comparison as a Measure of Excess Charges

22. New York and Rafferty challenge the adequacy of the methodology we employed to measure the impact of MECO's charges to the NTCs on interstate consumers. As noted above, we quantified MECO's apparently excessive

charges to the carriers by calculating the difference between the NTCs' authorized rate of return and MECO's realized return on investment on sales to the NTCs. Rafferty asserts that this rate of return comparison and subsequent adjustment did not eliminate excess costs associated with other alleged corporate misconduct which increased MECO's costs, but not its profits.[31] New York claims that recently acquired evidence in the New York Telephone Co. ("NYTel") rate case then pending before the New York Public Service Commission ("NYPSC") shows that the rate of return methodology is arbitrary and fails to recognize the full impact of NYNEX's alleged misconduct on ratepayers.[32] Responding to New York's claim, the NTCs appear to argue that this evidence is not relevant in this proceeding, maintaining that the state rate case is concerned with prospective relief for ratepayers whereas this proceeding allegedly focused on retroactive relief.[33] New York replies that the nature of the evidence, not the relief sought in the respective proceedings, should determine relevance.[34]

23. Calculating the precise impact of affiliate transactions on ratepayers presents difficult challenges for regulators. Experience has shown that this regulatory task is not an exact science. We employed a rate of return comparison between the regulated companies and the nonregulated affiliate in this case as a pragmatic means to calculate, for a five-year period, the impact of MECO's excessive charges to the NTCs on interstate consumers. This approach is embodied in the section of our affiliate transaction rules governing the provision of services;[35] since the NTCs' compliance with these rules was a central issue of the *Order to Show Cause*, it was reasonable to employ that approach in calculating the impact of MECO's prices on consumers. We also employed this approach prior to the codification of these rules in 1987 to measure the reasonableness of affiliate transactions.[36] Courts and regulators historically have recognized the validity of this methodology in the difficult area of affiliate transactions.[37] We believe that our use of that methodology to calculate overcharges in this proceeding is well within our discretion and provides a reasonable and workable regulatory tool to protect interstate consumers from improper transactions between affiliates. Our approach, of course, does not prejudice the ability of the NYPSC and other state regulators to employ alternative methodologies when exploring the impact of MECO's activities on intrastate ratepayers.[38]

F. Scope of Paragraph 7 of the Consent Decree

24. Finally, petitioners object to the following language contained in paragraph 7 of the consent decree:

> The Commission further agrees that this Consent Decree serves to resolve all issues now pending or which may be brought before the Commission arising from matters that are the subject of the *Order to Show Cause* and underlying audit. The Commission agrees that it will not institute new proceedings of any kind arising out of conduct on which the *Order to Show Cause* and underlying audit are based or other conduct associated with those matters and occurring during the time period covered by the *Order to Show Cause* and underlying audit.[39]

Petitioners charge that this language prejudices the rights of third persons to pursue claims against the NTCs, and prevents the Commission prospectively from enforcing the Communications Act.

25. Concerning the rights of third persons, Allnet argues that paragraph 7 improperly "settles" its pending formal complaint for damages against the NTCs for alleged unlawful affiliate transactions.[40] Similarly, Rafferty suggests that the consent decree may affect his informal complaint (File No. IC 91-01670), currently pending before the Commission, concerning the NTCs' accounting for certain legal fees.[41] The NTCs respond that Rafferty's informal complaint is unaffected by the consent decree, since it has nothing to do with the subject matter of the enforcement proceeding. With respect to Allnet, however, the NTCs argue that Count 2 of Allnet's formal complaint, which concerns alleged unlawful affiliate transactions, is barred because the consent decree affords Allnet the very relief it seeks in its complaint.[42]

26. Section 208 of the Communications Act grants any person the right to file a complaint against a carrier with the Commission.[43] Allnet and Rafferty fear that the consent decree somehow cut off their ability to pursue such claims before the Commission.[44] Their fears are unfounded. The Commission may not impair a person's statutory right to seek relief against a carrier and have a claim adjudicated under Section 208. Resolving our enforcement proceeding against the NTCs through the consent decree did not abridge the rights of third persons concerning pending or future Section 208 complaints about the NTCs' affiliate transactions. To the extent that the language of the consent decree arguably is ambiguous on this point, we emphasize that the consent decree does not preclude third parties from asserting their statutory rights under Section 208. Thus, Allnet, Rafferty, and TNI are free to pursue their pending complaints against the NTCs. However, to the extent the relief complainants seek has been received through the terms of the consent decree, complainants must show additional facts and prove greater harm to obtain further relief. We will examine all claims for damages against the NTCs in relation to the relief afforded by the consent decree in this proceeding.

27. Petitioners also claim that the scope of paragraph 7 of the consent decree is so broad that it prevents the Commission prospectively from enforcing the Communications Act. Rafferty contends that the consent decree effectively grants the NTCs "a prospective amnesty to continue [their] violations of the Communications Act."[45] New York asserts that the consent decree is an abdication of the Commission's duty to enforce the statute, arguing that paragraph 7 precludes the Commission from acting on the information developed before the NYPSC so far, or in the future.[46]

28. Petitioners overstate the scope and the effect of the settlement language contained in the consent decree. Paragraph 7 simply precludes further Commission enforcement action concerning prior conduct by the NTCs within the scope of the *Order to Show Cause* and the underlying audit. Contrary to Rafferty's assertion, the settlement in no way impedes our ability to address any other violations of the Communications Act or our rules by the NTCs, even if such violations raise issues similar to those presented in this proceeding (*i.e.*, alleged overcharges by affiliates and improper accounting for affiliate transactions). Moreover, New York's apparent suggestion that we should await the final outcome of the NYPSC's

open-ended investigation into possible violations affecting intrastate customers before acting in this proceeding offers the dubious prospect of indefinite delay and uncertain results. As noted above, we determined that adoption of the consent decree served the public interest by providing immediate, certain benefits for interstate consumers. We reaffirm that view today, and conclude that the immediate, clear benefits afforded consumers under the consent decree outweigh the uncertainty of waiting to see whether the NYPSC investigation into possible intrastate violations would provide for disallowances computed under a different approach for the same time period. We wish to emphasize, however, that to the extent specific information properly comes before us, either from the NYPSC or others, which indicates violations by the NTCs outside the scope of the audit and *Order to Show Cause*, we retain discretion to initiate new proceedings against the carriers.

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106 (1989), that the Petitions for Reconsideration of the *NYNEX Consent Decree Order* ARE DENIED.

30. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), that the NTCs' "Motion for Consolidated Response" IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, *Order*, 5 FCC Rcd 5892 (1990) (*NYNEX Consent Decree Order*).

[2] *See* New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, *Order to Show Cause and Notice of Apparent Liability for Forfeitures*, 5 FCC Rcd 866 (1990) (*Order to Show Cause*).

[3] The NTCs filed their opposition on November 20, 1990. Previously, on November 8, 1990, the NTCs had filed a "Motion for Consolidated Response" requesting permission to address all three petitions for reconsideration in one pleading to be submitted on November 20. Since the petitions raise similar issues, such a consolidated response avoids multiple and repetitious pleadings by the NTCs. Moreover, we perceive no prejudice to petitioners by approving the NTCs' request. Therefore, we grant the NTCs' motion and accept their November 20, 1990, consolidated opposition.

[4] *See* n.2, *supra*.

[5] 47 C.F.R. § 1.106(b)(1) (1989).

[6] NTCs' Opposition at 6-8.

[7] On March 14, 1990, pursuant to Section 1.41 of the Commission's rules, Rafferty moved the Commission to summarily "Affirm the NTCs' Liability for Forfeitures" or, in the alternative, seek public comment on the NTCs' response to the *Order to Show Cause*. We denied Rafferty's informal request in the *NYNEX Consent Decree Order*, 5 FCC Rcd at 5892, n.3. In his current petition, Rafferty asks us to reconsider our denial of his March 14 motion. As discussed below, in this *Order* we reaffirm our determination that adoption of the consent decree served the public interest; therefore, we decline to disturb our prior decision denying Rafferty's March 14 motion.

[8] New York Petition at 3. *See* 47 C.F.R. § 1.223 (1989) (providing for intervention in proceedings designated for hearing).

[9] 47 C.F.R. § 1.41 (1989).

[10] New York Reply at 2-3.

[11] Allnet Reply at 8-9.

[12] Allnet filed a formal complaint (File Nos. E-90-183 and E-90-184) against the NTCs with this Commission on April 6, 1990, seeking unspecified damages for, *inter alia*, alleged unlawful affiliate transactions by the carriers. That complaint, which is currently pending before the Commission, specifically references the Commission's February 8, 1990, *Order to Show Cause* in this proceeding.

[13] We note that Allnet's apparent lack of standing to seek reconsideration of the *NYNEX Consent Decree Order* does not foreclose its ability to file a complaint against the carriers with the Commission pursuant to Section 208 of the Communications Act. To the extent that Allnet may have suffered injury as a result of the NTCs' transactions with MECO, Allnet may pursue its remedy through the Section 208 complaint process. *See* Section III.F., *infra*.

[14] Allnet Petition at 4-6; Allnet Reply at 5-6; New York Petition at 15-16; New York Reply at 5.

[15] NTCs' Opposition at 12-13.

[16] Moreover, if an offending carrier contests a forfeiture imposed under the Communications Act, the Department of Justice must bring a separate civil suit against the carrier in United States District Court to recover the uncollected forfeiture. Such a proceeding would involve *de novo* review by the court. 47 U.S.C. § 504(a).

[17] Allnet maintains that the terms of the consent decree were far less severe than those which could have been imposed by an adjudication on the merits. Allnet Reply at 2-4. This assertion simply is wrong. As noted above, the requirements of the consent decree mirrored the proposed remedies outlined in the *Order to Show Cause*, except that the $1.419 million payment was a voluntary contribution rather than a forfeiture. Allnet alleges that this change resulted in tax benefits to the NTCs and a loss of revenue for the U.S. Treasury. Questions regarding federal income taxation are beyond our purview; in any event, we note that the deductibility of the payment appears uncertain. *See, e.g.*, 26 C.F.R. § 1.162-21(a), (b)(1)(iii) (1989); Adolf Meller Co. v. United States, 600 F.2d 1360 (Ct. Cl. 1979) (taxpayer denied deduction for amount paid in settlement of civil penalty). Moreover, we exercise our statutory forfeiture authority to protect ratepayers and deter violations of the Communications Act and our rules, not to generate revenue on behalf of the U.S. Treasury.

[18] Allnet Petition at 4-6; Allnet Reply at 5-6.

[19] Allnet Petition at 4 (internal footnote omitted).

[20] NTCs' Opposition at 9-12.

[21] *See, e.g.*, Virginia Metronet, Inc. d/b/a Centel Cellular Company of Virginia, Notices of Violations of Commission's Part 17 Marking and Lighting Rules, *Order*, 5 FCC Rcd 740 (1990) (adopting consent decree and terminating an enforcement proceeding against a carrier without public notice and comment).

[22] Allnet Petition at 2-4.

[23] Under 47 C.F.R. § 1.1208(c)(1) (1989), any adjudicative proceeding is restricted upon the filing of a formal opposition. When the Commission adopted this rule in 1987, it included proceedings conducted under Section 312 of the Communications Act, which include order to show cause proceedings, as adjudications. Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, *Report and Order*, 2 FCC Rcd 3011, 3027 (Rule Appendix) (1987) (*Ex Parte Order*). On reconsideration, the Commission stated even more explicitly that order to show cause proceedings would be treated as restricted adjudications. 2 FCC Rcd 6053, 6055, para. 16 (1987). The rule amendment, 47 C.F.R. § 1.1208(c)(4), states that order to show cause proceedings become restricted upon the issuance of the order to show cause. Section 1.1208(c) also provides, however, that such a proceeding would not be restricted if it were exempt under Section 1.1204, which in turn provides that all adjudications (as well as certain non-adjudicative restricted proceedings) are exempt if no formal opposition has been filed. *See* 47 C.F.R. § 1.1204(a)(1)(i) (1989).

We have no reason to believe that the Commission intended to make order to show cause proceedings restricted prior to the filing of a formal opposition to the position of the party against whom the order to show cause was issued (or issuance of a hearing designation order). Such an approach would be inconsistent with the Commission's treatment of all other adjudications, and the very purpose of the *ex parte* rules. As the Commission explained in adopting the rules, uncontested adjudicative proceedings are exempt from *ex parte* restraints "for the obvious reason that these proceedings do not ordinarily involve other 'parties,'" and communications with the Commission are therefore "not *ex parte*. " *Ex Parte Order*, 2 FCC Rcd at 3016, para. 38 and n.29. Accordingly, we conclude that whether this proceeding became restricted turns on whether or not Rafferty's March 14 motion to "Affirm NYNEX's Liability for Forfeitures" constituted a "formal opposition" to the NTCs' position as defined in Section 1.1202(e) of the rules. We conclude that it did. The caption and text of the pleading "make it unmistakably clear that the pleading is intended to be a formal opposition" to the NTCs' position, the pleading was served on the NTCs, and it did not violate any prescribed time period. 47 C.F.R. § 1.1202(e) (1989). We thus conclude that this proceeding became restricted upon the filing of Rafferty's March 14 motion.

[24] 47 C.F.R. § 1.1208(a) (1989). In light of our conclusion that Rafferty's motion constituted a formal opposition as defined by the *ex parte* rules, *see* n.23, *supra*, we reject the NTCs' suggestion (Opposition at 14) that Rafferty was not a party. The NTCs are also wrong in suggesting (*id.*) that Common Carrier Bureau staff were a party; they constituted decision-making personnel. *See* 47 C.F.R. § 1.1202(c) (1989). We also reject the NTCs' suggestion (Opposition at 9, 15 n.9) that Sections 1.93 and 1.94 of the Commission's rules (relating to consent orders) apply to this case. Those rules apply only to "an adjudicatory hearing proceeding," which this was not. *See* 47 C.F.R. § 1.93(a) (1989).

[25] 47 C.F.R. § 1.1204(b)(7) (1989). Allnet misquoted this section of the rules by leaving out the word "or" immediately prior to "for resolution of issues." *See* Allnet Reply at 8. This misquotation eliminates "resolution of issues" as a separate basis for the exemption, contrary to the language and intent of the rule.

[26] Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, *Notice of Proposed Rule Making*, FCC 86-284 at 12, para. 24, released July 9, 1986 (*Ex Parte Notice*), *summarized at* 51 Fed. Reg. 26278 (1986).

[27] As the Commission explained in proposing the exemption, "staff may make information requests *ex parte* on the condition that any new information obtained be subject to the 'permit but disclose' requirement now applied to informal rule making proceedings." *Ex Parte Notice* at 12, para. 24. *See* 47 C.F.R. § 1.1206(a)(2) (1989) (oral *ex parte* presentations in non-restricted proceedings need not be disclosed if they are "already reflected in that person's written comments, memoranda, or other previous filings in that proceeding").

[28] *See* Allnet Petition at 3-4.

[29] Also, contrary to Allnet's apparent position, the *ex parte* rules are not designed to protect the rights of non-parties (such as Allnet at the time of the settlement discussions) who might have an interest in a proceeding but have not yet come forward to participate. *See* Allnet Petition at 3-4.

[30] Allnet Reply at 6-7.

[31] This alleged misconduct, according to Rafferty, includes waste, kickbacks, procurement discrimination, chained transactions, and other imprudent business practices. Rafferty Petition at 2.

[32] New York Petition at 4. New York alleges that MECO's rate of return was artificially depressed by bloated expenses, losses on sales to non-affiliated companies, and chain transactions between MECO and other unregulated NYNEX affiliates that allowed NYNEX to funnel funds from NYTel through MECO to these affiliates. New York also charges that NYTel failed to seek goods and services from lower-priced vendors than MECO. *Id.* at 4-13. New York describes this evidence in general terms; apparently, much of the evidence it refers to remains subject to protective order in the NYPSC rate proceeding and cannot be described in detail at this time. *See id.* at 14, n.4.

[33] NTCs' Opposition at 16-18.

[34] New York Reply at 4.

[35] *See* 47 C.F.R. § 32.27(d) (1989); *Order to Show Cause*, 5 FCC Rcd at 868, para. 11.

[36] *See* AT&T, Charges for Interstate Telephone Service, Docket No. 19129 (Phase II) 64 FCC 2d 1, 80 (1977), *reconsideration*, 67 FCC 2d 1429 (1978). *See also Order to Show Cause*, 5 FCC Rcd at 867, para. 6.

[37] *See* Annot., 16 A.L.R.4th 454, 464-470 (1982) (collecting cases where courts have upheld regulators in restricting affiliates to authorized rate of return of regulated entity).

[38] We note that none of the petitioners challenged either our use of the rate of return methodology or the scope of the *Order to Show Cause* prior to the reconsideration stage of this proceeding. Indeed, Rafferty previously moved the Commission to summarily affirm the remedies proposed in the *Order to Show Cause*, which were explicitly based on our rate of return comparison between MECO and the NTCs. *See* n.7, *supra*.

[39] 5 FCC Rcd at 5894.

[40] Allnet Petition at 1, 4-6. Specifically, Allnet maintains that its rights were altered without an opportunity for notice and comment. *See* discussion at Section III.C., *supra*.

[41] Rafferty Petition at 2, n.1. In that complaint, Rafferty alleges that the NTCs improperly recorded in regulated accounts certain legal fees incurred in defending litigation concerning the conduct of NYNEX's unregulated subsidiary, Telco Research.

[42] NTCs' Opposition at 22.

[43] 47 U.S.C. § 208.

[44] Our review of complaints pending before the Bureau's Enforcement Division indicates one other formal complaint, filed by Telesphere Network, Inc. ("TNI"), which alleges improper affiliate transactions by the NTCs. TNI did not file a petition for reconsideration in this proceeding.

[45] Rafferty Petition at 3.

[46] New York Petition at 14-15; New York Reply at 6. New York notes that the NYPSC recently ordered another audit and investigation of NYTel's transactions with corporate affiliates. New York expresses concern that the Commission will be unable to benefit from any evidence of misconduct which might surface during this new inquiry unless the Commission reconsiders the consent decree. New York Petition at 15, n.5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CANNON COMMUNICATIONS CORPORATION	**MM DOCKET NO. 83-976** File No. BPH-811102AH
FIRST CLASS COMMUNICATIONS, LTD.	**MM DOCKET NO. 83-982** File No. BPH-820624AX
HEATHER H. STENGEL	**MM DOCKET NO. 83-983** File No. BPH-820624AZ

For a Construction Permit
for a New FM Station in
Chatham, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1991; Released: June 4, 1991

By the Commission:

1. The Commission has before it for consideration a consolidated pleading filed by Cannon Communications Corp. on March 4, 1991 which requests two forms of relief.[1] First, Cannon asks us to reconsider and reverse our denial, in *Cannon Communications Corporation*, FCC 91-23, released January 31, 1991, of a petition to reopen the record and add a hearing issue concerning the financial qualifications of First Class Communications, Ltd. (FCCL). Second, Cannon asks us to hold this proceeding in abeyance pending judicial resolution of the proceeding under Chapter 11 of the Bankruptcy Act, 11 U.S.C. § 1101 *et seq.*, that FCCL opened last fall by filing a petition for protection from creditors. We will deny both requests.

BACKGROUND

2. The Commission awarded a construction permit for the channel at issue to FCCL[2] five years ago, after upholding a determination by the Review Board that FCCL was the best-qualified applicant in this case. *Order*, FCC 86-244, released May 15, 1986, *aff'g Cannon Communications Corp.*, 101 FCC 2d 169 (Rev. Bd. 1985). Cannon filed an appeal from the decision with the Court of Appeals. Thereafter, despite the pendency of Cannon's appeal, FCCL built its station and began broadcasting early in 1987 pursuant to provisional authority.

3. In October 1987, nine months after FCCL had gone on the air, Cannon filed a motion for remand, presenting an affidavit accusing FCCL's principal of attempting to deceive the Commission. The court granted the remand motion, and the Commission ordered further hearings on misrepresentation issues against FCCL. 3 FCC Rcd 4291 (1988). The Commission also added an abuse of process issue against Cannon on the basis of countercharges by FCCL. *Id.* The ALJ held in a supplemental initial decision, however, that the evidence taken at the remand hearing did not materially impugn the basic qualifications of either applicant, and the Board affirmed that conclusion. 4 FCC Rcd 7514 (ALJ 1989); 5 FCC Rcd 2695 (Rev. Bd. 1990).

4. Cannon filed an application for review of the Board's affirmance of the supplemental initial decision, and while that appeal was pending before the Commission it also filed a motion to reopen the record and enlarge the hearing issues yet again. Cannon contended that FCCL's Chapter 11 petition discloses that it is insolvent and therefore that FCCL is financially unqualified. Cannon also contended in the remand motion that circumstances indicated that FCCL had tried to conceal its financial condition from the Commission.

5. We simultaneously denied the application for review and the remand motion in our order of January 31, *supra*. Regarding the latter, we held that Cannon's allegations raised no serious question as to FCCL's candor and that FCCL's filing of the bankruptcy petition did not raise a material doubt as to its financial qualifications, as it had already demonstrated financial qualification by building its station and then operating it for more than three months. Indeed, we noted, FCCL had been operating the station for three and one-half years. FCC 91-23 ¶¶ 7-8.

DISCUSSION

The petition for reconsideration of the denial of the remand motion

6. Cannon complains that in denying its remand motion we "mechanically and arbitrarily" invoked the usual test of financial qualification without regard to the underlying purpose of assessing financial qualification as it bears upon the special circumstances of this case. That purpose, Cannon asserts, citing *Ultravision Broadcasting Co.*, 5 RR 2d 343 (1965), is to ensure that broadcast authorizations are granted only to applicants that are reasonably likely to provide service "on a continuing basis." It argues that in order to uphold that policy the Commission must assess FCCL's *prospective* financial capability and therefore that its previous construction and operation of the station is irrelevant.

7. Cannon's argument is little more than a rehash of the arguments that it raised in its petition to reopen. Reconsideration will not be granted for the purpose of again debating matters upon which we have already deliberated and spoken. *See WWIZ, Inc.*, 37 FCC 685 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965). Moreover, Cannon is mistaken in contending that it would serve the underlying purpose of the Commission's policy of assessing financial qualifications to engage in a speculative inquiry concerning the financial capability of a permittee that has already sustained operation for more than three and one-half years. The object of that policy is to ensure that grantees will have the means to promptly build their proposed stations, promptly put them into service, and sustain operation during an initial period, all of which FCCL has already done. *See New Financial Qualifications Standard for Aural Broadcast Applicants*, 43 RR 2d 1101, 1102 (1978), and *Central Texas Broadcasting Co., Ltd.*, 74 FCC 2d 393, 398

¶ 17 (1979). We have no desire to discourage applicants from proceeding with construction and the initiation of new service pending resolution of appeals from Commission orders by holding that they may be forced into rehearing under a financial issue at risk of disqualification even after having completed construction and having operated for several years.

The motion for an order holding the proceeding in abeyance

8. Cannon alleges that it is apparent from information filed in the Chapter 11 proceeding that FCCL will probably not be reorganized under the sole ownership of Joseph Ryan but that the proceeding will, instead, probably result in an involuntary transfer of FCCL's assets to a trustee or in a reorganization diminishing Ryan's ownership interest. Cannon asserts that an involuntary transfer to a trustee would be a change in "core circumstances" that would necessitate reopening the record. Hence, Cannon argues, it would serve the public interest to hold this case in abeyance pending the outcome of the bankruptcy proceeding, because this might obviate additional proceedings and possible service interruption. It adds that the time and effort spent in evaluating FCCL will be for nought if an unrelated party is appointed to liquidate it.

9. Following the well-known doctrine of *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), as modified by *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), the Commission normally considers these four factors when evaluating requests for stay *pendente lite:* (1) the likelihood that the party seeking the stay will prevail in its appeal; (2) whether the petitioner will incur irreparable injury in the absence of a stay; (3) the likelihood that granting a stay would be harmful to other parties; and (4) how granting a stay would affect the public interest. The first of those factors is not precisely apt here, as Cannon is not requesting a stay pending decision on an appeal. Instead, it predicates its request for relief upon the prospect that the Chapter 11 proceeding in which FCCL is involved will result in an involuntary transfer. It has failed to make a sufficient showing of likelihood in this regard, as it merely speculates that the Chapter 11 proceeding will lead to that result, without showing that this is certain, or even likely. It does not allege that it will suffer irreparable harm unless we grant its request, and it has made no showing relevant to factor (3), in spite of the fact that staying action could harm FCCL by forestalling final resolution of this proceeding, thus perpetuating its status as a disputed permittee. Finally, Cannon has not shown that granting a stay would serve the public interest. Therefore, it has failed to persuade us that a stay is warranted.

10. ACCORDINGLY, IT IS ORDERED that the combined petition for reconsideration and motion for stay of action filed by Cannon Communications Corp. on March 4, 1991 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Cannon filed its pleading in violation of 47 C.F.R. § 1.44(e), which states that stay motions must be filed separately. We will consider the stay motion, however, because dismissing it and requiring it to be refiled separately would merely result in further delay of the final resolution of this case. First Class Communications, Ltd. filed an opposition to the pleading in question on March 19, 1991. Cannon filed a reply on March 29.

[2] Actually, it awarded the permit to Joseph A. Ryan, FCCL's sole stockholder, who originally prosecuted his application in his own name. For the sake of simplicity, we will consistently refer to the applicant as "FCCL".

Before the
Federal Communications Commission
Washington DC 20554

Gen. Docket No. 89-88

In the Matter of

Inquiry into the Existence
of Discrimination in the
Provision of Superstation
and Network Station Programming

SECOND REPORT

Adopted: May 9, 1991; Released: June 5, 1991

By the Commission:

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I. INTRODUCTION

A. Background

1. In 1988 Congress amended the Copyright Act [1] and provided a compulsory copyright license for transmission of certain types of broadcast programming received by home satellite earth stations (HSDs). This amendment was prompted by questions about the legal status of satellite retransmission of broadcast video programming under prior copyright law and the desire to assure continued access to programming by dish owners. [2]

2. The compulsory license provided by the SHVA extends to satellite carriers [3] that retransmit broadcasts of superstations and network stations [4] to dish owners for private home viewing. [5] This license permits the carrier to pay copyright royalties based on a set statutory amount instead of on privately negotiated rates. The license is limited in time and will expire in 1994 when Congress anticipates that a compulsory license will no longer be necessary.

3. Included in the SHVA is a provision making it an act of copyright infringement, subject to various copyright remedies, for a satellite carrier to unlawfully discriminate against a distributor. [6] In connection with this anti-discrimination provision, Congress directed the FCC to prepare "a report on whether, and the extent to which, there exists discrimination described in Section 119(a)(6) of

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[1] Satellite Home Viewer Copyright Act of 1988 (SHVA), Pub. L. No. 100-667, 102 Stat. 3935 at 3949 (1988), amending 17 U.S.C. § 101 *et. seq.*

[2] *See* H. R. Rep. No. 100-887, Part 2, 100th Cong. 2d Sess. 13 (1988), (*House Report, Part 2*). Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 5 FCC Rcd 523 (1989) (*Report*) at para. 11.

[3] A satellite carrier is an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private viewing. 17 U.S.C. § 119(d)(6).

[4] A superstation is a television broadcast station, other than a network station, licensed by the Federal Communications Commission whose signal is secondarily transmitted by a satellite carrier. 17 U.S.C. § 119(d)(9). A network station is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day. It includes any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station. 17 U.S.C. § § 119(d)(2), 111(f).

[5] Private home viewing is the viewing, for private use in a household by means of satellite reception equipment which is operated by an individual in that household and which serves only such household, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Commission. 17 U.S.C. § 119(d)(3). A primary transmission is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted. 17 U.S.C. § § 119(d)(4), 111(f). A secondary transmission is the further transmitting of a primary transmission simultaneously with the primary transmission. 17 U.S.C. § § 119(d)(7), 111(f).

[6] 17 U.S.C. § 119(a)(6). A distributor is an entity that contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private home viewing or indirectly through other program distribution entities. 17 U.S.C. § 119(d)(1).

Title 17, United States Code" (the Copyright Act).[7] In response to this directive, the Commission instituted this inquiry proceeding[8] and released its *Report*,[9] as well as a Further Notice of Inquiry (*Further Notice*).[10] This *Second Report* concludes the proceeding.

B. The Commission's Inquiry

4. The initial step in this investigation was to define unlawful discrimination. Because the SHVA does not include its own definition, the *First Notice* preliminarily identified the test used in proceedings under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), as the appropriate standard for commenters to use in addressing the issues raised by this inquiry. This is the only test for unlawful discrimination contained in the Communications Act and the Commission is limited to issues within its jurisdiction and expertise by the legislative history accompanying the SHVA.[11] The test in Section 202(a) has three components; 1) whether the services in question are like services; 2) whether discrimination has occurred; and 3) whether such discrimination is just and reasonable. The comments submitted in response to the *First Notice* addressed this standard in terms of the market for satellite delivery of superstation and network station programming to home earth stations.

5. The Commission's *Report* reached the following conclusions:

> (a) Satellite delivered superstation and network station programming is accessible to home earth station users both directly from satellite carriers and through a variety of entities servicing them as distributors;
>
> (b) Based on the evidence in this record, there appears to be no general pattern of unlawful discrimination by satellite carriers among the various entities operating as distributors of superstation and network station programming to home earth stations;
>
> (c) Evidence has been submitted indicating that satellite carriers are charging higher rates for programming provided to home dish distributors than rates charged for cable distribution. The record contains little or no information as to the reasons for these differences, making it impossible for us to determine whether the higher rates are just and reasonable. Because this evidence raises serious concerns about the competitive nature of this market, and the impact on consumers, we intend to initiate a further notice of inquiry in order to develop a more complete record on this issue.[12]

6. In the *Further Notice*, we provided additional focus to our investigation by requesting that commenters address the following questions:

> (a) Are services to distributors and other video programming providers such as cable television system operators "like" for purposes of determining if unlawful discrimination exists?
>
> (b) Do satellite carriers charge higher prices to, or engage in more burdensome practices with, home earth station distributors than cable television system operators or other video service providers for superstation and network station programming?
>
> (c) Are there cost or other factors that justify higher charges or more burdensome practices by satellite carriers with respect to distributors? If so, what are the specific costs involved in serving distributors as compared to the rates charged for programming?
>
> (d) If unlawful -- *i.e.*, unjustified -- discrimination exists, what remedial action should the Commission take and pursuant to what jurisdictional authority?[13]

As in the *First Notice*, we asked that entities identified as satellite carriers provide a range of contracts and in this phase, the contracts were to reflect rates charged to cable systems, satellite master antenna systems (SMATV), and wireless cable operators in order that they could be compared with rates charged to distributors to earth stations. All five carriers complied with this directive. After reviewing the material submitted, we asked satellite carriers to respond to specific confidential questions designed to provide some uniformity to the cost information each carrier filed.

7. In response to our *Further Notice*, five entities describing themselves as satellite carriers responded.[14] The National Rural Telecommunications Cooperative (NRTC), which operates as a satellite earth station distributor was the only distributor to file comments. K Prime Partners L.P. and Tele-Communications, Inc. (TCI) filed in response to the Commission's question about their new

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[7] 47 U.S.C. § 713. Section 119(a)(6) provides:

> Notwithstanding the provisions of paragraph (1), the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier unlawfully discriminates against a distributor.

[8] Notice of Inquiry, 4 FCC Rcd 3883 (1989) (*First Notice*).

[9] 5 FCC Rcd 523 (1989).

[10] 5 FCC Rcd 3760 (1990).

[11] "The Committee notes that the term 'discrimination' as it is used in Section 119(a)(6) of the Copyright Act is expressly limited to discrimination within the jurisdiction of the Commission pursuant to the Communications Act. The purpose of Section 119(a)(6) is to make certain discriminatory acts involving particular parties actionable under the Copyright Act. In adopting this language, the Committee does not intend the Commission to address issues and concerns that are outside its jurisdiction and expertise." *House Report Part 2*, *supra* n. 2 at 22.

[12] *Report* at para. 6.

[13] *Further Notice* at para. 3.

[14] The satellite carriers filing comments and contracts are Eastern Microwave, Inc. (Eastern), Prime Time 24 (a.k.a. Satellite Broadcast Network), Southern Satellite Systems, Inc./Netlink USA (Southern/Netlink) (filing joint comments) and Superstar Connection (Superstar) (filing on behalf of itself and United Video). *See* Appendix A for list of Congressional inquiries and informal comments received.

video programming service. [15] The National Cable Television Association, Inc. (NCTA) filed reply comments. In general, the comments addressed the questions posed by the *Further Notice* and provided significant assistance in the preparation of this *Second Report*.

8. It is neither feasible nor appropriate in this general study to make precise judgments regarding cost allocations that could be made in, for example, a telephone company rate case. Indeed, since we issued the *Further Notice*, NRTC has filed formal complaints alleging violations of Section 202(a) by a number of satellite carriers -- United Video, Southern Satellite and Netlink. Those proceedings will focus on questions of fact regarding specific activity. Nevertheless, we have determined, based on the record compiled and even giving satellite carriers, whose practices have been challenged, the benefit of all appropriate inferences, some satellite carriers are charging unjustifiably higher rates to some distributors than to some cable operators for superstation and network station programming.

II. DISCUSSION

9. The questions posed in the *Further Notice* served as a framework for the information presented in the comments and for the conclusions reached in this *Second Report*.

A. Are Services to HSD Distributors and Cable System Operators Like Services?

10. The first question asked was whether services provided to earth station distributors and to cable system, SMATV and wireless cable system operators are "like services". [16] Our *Report* [17] stated that the legal standard to determine like services is based on the functional equivalency test which looks to whether the services under scrutiny differ in any material functional respect based on the perception of the customer. [18] The cases discussing the functional equivalency test emphasize that the analysis should focus on the view of the customers, [19] who in this case are HSD distributors and cable system operators. One question to be determined is "... what function or need do customers perceive to be satisfied by the services under examination." [20] If the perception is that they perform the same function, price will govern which service is chosen. Services do not have to be identical to be deemed "like". [21] In a recent discussion of like services, the Commission noted that the test also considers differences in objective technical matters as well as customer perception. It found that in the case before it, a comparison of technical and operational features, combined with evidence regarding customer perception, rendered the services at issue unlike under the functional equivalency test. [22] In applying the like services test, commenters in this inquiry were asked to focus on wholesale service to distributors and other program providers.

11. The *Report* described the technology involved in delivering superstation and network station programming to HSDs. [23] The satellite carriers uplink the scrambled broadcast signal from the television station and retransmit it via satellite to individual earth stations. The carriers use the Videocipher II encryption system which is administered through a DBS Authorization Center in California. This system uses "tier bits" which are essentially "on-off" switches, each one of which may control access to a scrambled satellite service or group of services. The DBS Center receives information on which services each individual home decoder is authorized to receive. Information on authorization is compiled in a single authorization data stream which is then inserted into the satellite signal prior to uplink. When the satellite signal with the authorization information included in it reaches the home decoder, the channels to which the owner has subscribed are authorized, and the decoder will then unscramble those channels.

12. Satellite carriers can provide DBS Center authorization themselves or through distributors. Distributors that perform authorization services must obtain "tier bit access" from the carrier (*i.e.*, authorization to make use of the carrier's tier bit or tier bits) for which they pay a fee. Distributors do not perform any transmitting functions but may provide other services such as marketing, billing, or authorization depending on contractual agreements with the satellite carrier.

13. The *Report* reached a preliminary conclusion that, based on the limited record compiled, service to home earth stations and cable systems by satellite carriers "may well be like as that term is used in Section 202(a)." [24] The Commission noted that carriers offer "the same programming in a scrambled format using the same uplink facilities, transponder capacity, radio frequencies and receiving technology to serve both customers" [25] and that any differences in service do not appear to be material functional differences. [26] The discussion of like services in the *Report*

---

[15] K Prime filed comments stating that it is a limited partnership formed to provide direct to home satellite delivered programming in the 12/14 GHz (Ku) band. It plans to include several superstation signals in its program package. K Prime is planning to engage in a test marketing effort after which it contemplates a nationwide service using licensed distributors. Regular service to residential customers had not yet been instituted at the time the comments were filed.

[16] *See* 47 U.S.C. § 202(a).

[17] See *Report* at paras. 61-63 for discussion of like services issue.

[18] *See* MCI Telecommunications, Corporation v. FCC, 842 F. 2d 1296, 1307 (DC Cir. 1988); Ad Hoc Telecommunications Users Committee v. FCC, 680 F. 2d 790 (DC Cir. 1982); American Broadcasting Companies, Inc. v. FCC, 663 F. 2d 133 (DC Cir. 1980).

[19] Ad Hoc Telecommunications Users Committee v. FCC, *supra* note 18 at 797.

[20] *Id.*

[21] *Id.*

[22] AT&T Communications, 5 FCC Rcd 298, 301 (1990). The Commission concluded that, although the evidence was not determinative on the issue of customer perception, when viewed in conjunction with the findings regarding technical and operational differences, a finding that these services were not "like" was warranted.

[23] *Report* at paras. 24-26.

[24] *Report* at para. 63.

[25] *Id.*

[26] *See* discussion of "like services" in *Report*, at paras. 61-63. The comments submitted in the initial phase tended to address the issue of like services from the perception of the end user earth station customer and not from that of the distributor or cable system operator.

was based primarily on the arguments in comments submitted by NRTC in that original record. The various satellite carriers did not extensively address this issue in that proceeding. The *Further Notice* reiterated our preliminary conclusion and requested that commenters address the perception of distributors and cable system operators or other purchasers of programming as the customers of satellite carriers. [27]

14. Comments filed in this proceeding differed along functional lines, with NRTC defending its position that these are like services and satellite carriers asserting that they are not. Carriers' comments focused more extensively on this question than they did in the initial phase of this inquiry and provided detailed descriptions of the industry.

15. Satellite carriers generally assert that these are not like services to similarly situated customers. They state that the like services test looks to the nature of services offered with equal importance afforded to the fact that customers may fall into similar classifications. [28] They argue that the test should not overemphasize similarities in physical equipment and ignore differences in services rendered and perception of users. [29]

16. Carriers assert that there is a "fundamental distinction" between the service provided by satellite carriers to the cable and home earth station industries. With cable distribution, the carrier delivers broadcast signals to one location -- the cable headend. The rest of the transmission is done by the cable operator, or the SMATV or MMDS operator, and the carrier has no further function or responsibility. With transmission to home earth stations, the carrier provides the total transmission path to each of the distributors' individual customers and the distributors themselves can not provide programming without the carriers' end to end service. [30] Delivery to multiple receiving sites, carriers maintain, is an inherently valuable service and should be reflected in the price of the programming charged to HSD distributors. [31]

17. Carriers' comments further distinguish these services by stating that distributors do not install equipment but only provide authorization to receive programming via computers. Distributors have no control over unauthorized receipt of service ("signal piracy"). The only customer service they provide is through toll free telephone lines, and they only perform part of the marketing function associated with HSD sales. Cable operators, on the other hand, install equipment, perform on-site audits for piracy and conduct their own marketing. Because superstation signals are included in a cable subscriber's basic tier of service, general promotional efforts by cable operators to obtain subscribers will include promotion of these stations. In HSD distribution, superstations and network stations are sold both a la carte and as part of a variety of packages. Carriers claim programmers thus must spend money specifically to establish brand recognition of individual stations in order to sell their service. They argue that an earth station owner has many more programming choices and brand recognition is more important in the HSD market. Carriers assert that these factors demonstrate that cable, SMATV and wireless cable operators are not similarly situated customers when compared to HSD distributors whose function is comparable to marketers of programming for home earth stations.

18. The carriers claim a finding of "like" services is justified only when there is significant cross-elasticity of demand between products and services: that cross-elasticity, they maintain, is not present here. [32] They contend distributors are not essential to HSD delivery and thus they only enhance, but are not responsible for, service. Superstar claims that case law supports a finding of dissimilar services. [33]

19. In addition, carriers claim that cable operators and earth station distributors are not similarly situated because the former are subject to a local franchise process and have invested substantial amounts of money in equipment. Distributors have not made such an investment, do not own the equipment in subscribers' homes, are not subject to franchise requirements and are, in Superstar's words, essentially unnecessary middlemen. Further, distribution to home earth stations requires the use of the DBS center and equipment to control individual authorizations while a cable headend, with one carrier authorization, can serve thousands of subscribers. One cable multiple system operator can produce several million customers, allegedly allowing for volume discounts impossible in the HSD industry where there are only 550,000 legitimate subscribers. [34] Carriers argue that the technical and operational features of these services differ in material respects because HSD service must be routed through a DBS center and service to cable, SMATV and wireless cable can be transmitted directly to the operator.[35]

20. The functional equivalency test is not met here, according to the carriers, [36] because the customers of the satellite carrier -- cable system operators and earth station distributors -- do not perceive the value and substance of these services in the same way. Cable operators view the superstations they transmit as part of their basic package provided to most or all of their customers. The competition to be included in this basic package is great because there is limited channel capacity and wide distribution of basic tier service. Cable operators have to pay a copyright fee for superstations and network stations that they do not pay for other programming. A satellite carrier cannot provide service to cable subscribers without contracting

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[27] *Further Notice* at para. 10.

[28] Southern/Netlink Comments at 10 citing The Offshore Telephone Company v. South Central Bell Telephone Company and American Telephone and Telegraph Company, 2 FCC Rcd 4546, 4552 (1987).

[29] *Id.*, citing, Ad Hoc Telecommunications Users Committee v. FCC, *supra* note 18 at 808 (concurring opinion).

[30] *See* Reply Comments of NCTA.

[31] Comments of Southern/Netlink.

[32] Comments of Superstar; *see* Ad Hoc Telecommunications Users Committee v. FCC, *supra* note 18 at 796.

[33] Pacific and Southern Co., Inc. v. Satellite Broadcast Networks, Inc. *(Pacific and Southern)* 694 F. Supp. 1565 (N.D. Ga. 1988). This case was decided prior to the passage of the SHVA and held that distribution to home earth stations was not the same as a cable system for purposes of the Copyright Act's cable system compulsory license. The case was based on an analysis of prior copyright law and did not address the issue of "like services" under § 202(a) of the Communications Act.

[34] *See* Comments of Superstar.

[35] Superstar cites AT&T Communications, *supra* note 22, for the proposition that such technical and operational differences would render services unlike. That case found that the difference in the type of switch used for the services in question rendered them unlike for Section 202(a) purposes.

[36] *See* Comments of Eastern.

with cable operators and adapting to their pricing structures but the carrier can serve HSD customers through a variety of distributors or directly.

21. In contrast, with HSD distribution, the service satellite carriers offer is only one of a large number of program options available on an a la carte basis. This service is not marketed as a basic package to earth station owners and is not heavily promoted to or widely received by dish owners. Carriers can and do sell their services directly to dish owners without intervention of distributors. [37]

22. NRTC states that these are like services and that the carriers' comments do not properly address the perspective of the wholesale customer. NRTC states that the carriers have focused on their own participation in the HSD retail market by claiming that distributors are unnecessary middlemen instead of recognizing that the carriers themselves are unnecessarily operating as retailers. NRTC asserts that all it requires from carriers at the wholesale level is carriage of the encrypted signal. NRTC then assumes the responsibility for provision of the programming to the customer, just like a cable system. NRTC also asserts that a distinction should be made between the functions performed by some distributors like itself that provide significant customer assistance and others that use more of the carriers' resources and thus operate more like sales agents.

23. Based on its analysis, NRTC claims that there is no functional difference in the services delivered by a carrier to any category of wholesaler, including cable operators. It states that it performs the same functional processing as a cable operator, including the descrambling of the signals and the combining of signals into programming packages.[38]

24. NRTC also states that: it purchases and receives scrambled signals like a cable operator; it distributes those signals to consumers like a cable operator; it provides the same administrative support as a cable operator; it markets services locally; it directly authorizes customers; it bills monthly, collects locally and provides the carrier with a monthly payment for all subscribers; and it resolves numerous customer inquiries. According to NRTC, these factors indicate that there are no functional differences in its ability to serve the dish owner and the cable operator's ability to serve its subscribers.

25. With respect to carriers' assertions that distributors do not perform activities related to customer equipment,[39] NRTC states that its members actually install and maintain receiving equipment. In some cases, NRTC provides equipment on a leased basis and the customer pays one monthly bill like a cable customer. NRTC states that through the use of its DBS port, it is responsible for providing a quality signal at the customer's residence through a coaxial cable [40] from the home earth station. The cable operator is only distinguished by the fact that it uses one dish at its headend and a longer cable. NRTC also disputes claims by some carriers [41] that distributors have no investment in equipment to serve the HSD market and states that it has distributed more than 8 million dollars of reception and decoding equipment to its member cooperatives for further sale or lease. Its members have also sold or leased additional equipment and millions of dollars have been invested in facilities to serve the HSD market. The satellite carriers performing retail HSD services do not, according to NRTC, have any local presence and carriers have no way of performing any local services through their central back offices.

26. *Conclusion.* Although the *Report* preliminarily concluded from evidence submitted by NRTC that the services "may well be like, " evidence submitted in response to the *Further Notice* does not permit a conclusive determination here of whether satellite carrier services to cable operators and distributors are "like" under a Section 202(a) type of analysis. The test asks whether the services are functionally equivalent, which includes how they are objectively viewed from the perspective of the customer -- the cable system operator and the distributor -- and whether there are technical or operational features that render the services unlike.

27. There are substantial questions regarding whether these customers are receiving a like service. Satellite carriers must pay copyright fees for the customers affiliated with an HSD distributor. Cable operators pay copyright fees for customers affiliated with them. In addition, cable operators purchase a scrambled signal which is received at their headend for descrambling and further distribution. HSD distributors purchase the right to market signals for which the satellite carrier must provide DBS access and technical decoding capability in order that they may be usable by individual dish owners. Other aspects of this service might indicate that these services are like. For example, each customer controls end user access to the same superstation and network station programming delivered by satellite carriers. The specific question of whether or not these are like services will be one issue in the proceeding resolving the pending complaints referenced above.

28. A conclusion regarding "like services" under the Section 202(a) functional equivalency test would not necessarily resolve the issue of whether satellite carriers are violating the anti-discrimination provision of the SHVA. There is no definition of discrimination in the SHVA and thus the Commission, earlier in this proceeding, identified the Section 202(a) test as a possible measure of unlawful discrimination. However, Section 202(a) would not, for example, reach activities of satellite carriers who are not acting as common carriers. Congress acknowledged this situation in the legislative history accompanying the SHVA by stating that the regulatory status of entities operating as satellite carriers is unclear. [42] To the extent satellite carriers are not offering a common carrier ser-

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[37] *See* Comments of Eastern. Other commenters emphasized the differences in serving the distributors and other entities. *See, e.g.,* Reply Comments of NCTA, Reply Comments of Superstar.

[38] NRTC distinguishes the case cited by Superstar, *supra* note 22, by stating that the Commission relied on several factors other than technical and operational differences and that when all of these factors are applied to this inquiry, the case actually supports a finding that services to distributors and cable operators are like services.

[39] *See, e.g.,* Comments of Eastern.

[40] This cable is part of the home owner's earth station equipment.

[41] *See* Comments of Superstar and Eastern.

[42] *House Report, Part 2, supra* note 2 at 21-22.

vice, the like services test and Section 202(a) are not relevant. Our inquiry thus does not terminate with this issue but instead examines the remaining questions in order to provide an accurate study of this market.

B. Do Satellite Carriers Charge Higher Prices to or Engage in More Burdensome Practices with HSD Distributors?

1. Prices

29. The next question posed by our *Further Notice* is whether satellite carriers charge higher prices or require more burdensome terms in their dealings with earth station distributors than they do with cable operators, SMATV system operators or MMDS operators. The limited record in the *Report* suggested that distributors are paying substantially more for this programming than are other providers. [43] In order to supplement the record on this issue, the *Further Notice* asked for specific comments as well as a range of contracts from satellite carriers that would enable a comparison of rates., [44]

30. *Conclusion*. Based on an analysis of this supplemental information, it is clear that rates to HSD distributors in all instances are significantly higher than those charged to other entities. [45] Although we do not divulge particular contract terms because all the satellite carriers have requested that their contracts be afforded confidential treatment, [46] we will cite some examples of pricing structures without revealing the identity of individual parties.

31. In one example, based on provisions in contracts submitted, a satellite carrier charges a small cable system with thirty subscribers a monthly rate of 14 cents per station in a package of three stations. For this same set of signals, *i.e.*, the same station if purchased in a package of three, the carrier charges a distributor 75 cents per station, per subscriber, per month. Another carrier charges large (over one million subscribers) cable systems as little as 1 cent or 2 cents per station while an HSD distributor with a large customer base (approximately fifty thousand subscribers) is charged 70 cents per channel if purchased in a package. In a third example, a carrier's rates to cable systems are in the range of 1 cent to 10 cents while the lowest rate to a distributor with a large number of subscribers is 40 cents per station when purchased in a package of three or four. For all carriers, rates charged to SMATV and wireless cable operators fall in the same range as those charged to cable systems. These examples are not isolated and represent the industry norm as reflected in the contracts filed.

2. Practices

32. Although we are able to reach a definitive conclusion that prices charged HSD distributors are significantly higher than those charged others, the contracts do not always lend themselves to accurate comparisons when all terms and conditions are analyzed. The contracts vary widely depending on a number of factors. In general, most carriers' contracts with HSD distributors are limited to 12 month terms while those with other entities ranged from 32 to 60 to 70 month terms, although this was not true of all carriers. Many of these contracts contain provisions to adjust rates during the contract term. Contracts with the same carrier vary in the number of stations carried and, in some instances, in the identity of the stations. Contracts with HSD distributors are, more often than not, for packages of stations while cable systems often only buy one superstation from a carrier. One carrier's contracts contain provisions for HSD distributors to pay a monthly minimum fee to the carrier if the distributor does not have its own port at the main DBS authorization center. This provision, of course, is not included in cable system contracts. [47] Some carriers provide "brokers" contracts for HSD or SMATV operators where the carrier pays the distributor a percentage of the total amount received from the sale of programming to the distributor's subscribers. In some cases, the carrier provides the distributor with suggested prices to charge the ultimate consumer. Other contracts are not based on charges per subscriber or per station but instead are figured on certain base amounts and provide for adjustments due to an increase or decrease in the number of subscribers.

33. NRTC asserts that the satellite carriers practice discrimination in the terms and conditions they require in HSD distributor contracts. According to NRTC, these contract provisions are designed to protect the carriers' own retail HSD business. Examples of such agreements would allow the carrier to remove the independent distributor for replacement with its own retail distribution system. Other contracts, according to NRTC, have provisions that render them null and void if legislation or regulation requires nondiscriminatory prices.

34. NRTC cites additional types of contract terms which it says are required of HSD distributors but are not required of other program providers. These include covenants not to compete, refusals to extend price discounts and terms limiting distribution rights with restrictions on the number of customers and the geographic area to be served. NRTC also objects to packaging restrictions which dictate the number of signals that must be purchased and the additional programming that must be provided in a package. NRTC claims that these restrictions limit its ability to provide diversity of programming. It also states that clauses which require disclosure of marketing and promotion plans give carriers a retail competitive advantage, as do clauses requiring revelation of subscriber information. According to NRTC, if a distributor is not able or willing to assume a rate increase, a carrier can substitute its own retail operation and eliminate the distributor. NRTC asserts that these types of contract terms are used by carriers to support artificially high retail rates and to subsidize the carriers' own retail businesses with artificial wholesale rates.

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[43] *Report* at para. 64.

[44] *Further Notice* at paras. 11-13.

[45] *See* similar conclusion in Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service (*Cable Report*), 5 FCC Rcd 4962 (1990) at para. 103. The Commission's findings in the *Cable Report* are based on evidence submitted by NRTC in that proceeding.

[46] *See* 47 C.F.R. § 0.459.

[47] Authorization through the DBS Center is not needed for cable distribution.

35. *Conclusion.* Our analysis of the contracts submitted indicates that some do contain the types of clauses about which NRTC complains. However, it is not clear that the inclusion of such clauses constitutes unlawful discrimination. The clauses requiring customer information from distributors are directed to collecting information to assure compliance with the copyright reporting requirements of the SHVA. Carriers' copyright liability under this statute is based on the number of subscribers it serves, and whether these are served directly or through distributors, and thus it is essential that they have accurate subscriber counts. In addition, any carrier providing network signals needs accurate site locations of subscribers to verify that individual dish owners are qualified to receive the particular network involved. [48] Carriers also need to have information on individual descrambling units in order to attempt to prevent signal piracy. In many of the contracts we reviewed, carriers acknowledge the proprietary nature of the subscriber information requested and the contracts themselves limit the use of the customer information and prohibit its disclosure.

36. Other types of terms, such as those requiring disclosure of marketing and promotion plans and restrictions on program packaging, could be legitimate if, for example, related to an objective need to maintain some amount of overall control of marketing functions. The carriers state end user consumers often do not make the distinction between the distributor and the carrier and sometimes look to the carrier as the provider of service. Carriers thus have an interest in assuring that their programming is adequately promoted and earth station customers are properly serviced. [49] In addition, channel packaging may be a more appropriate way to market signals to earth stations because of the necessity to establish name brand recognition and because of the wide choice of channels available to HSDs. Some of the contracts reviewed did allow the carrier to maintain service to the dish owner if the distributor is no longer able to do so, but only under specifically defined circumstances. In addition, covenants not to compete were not common in the contracts submitted, although at least one contract reviewed did contain such a clause in a version signed before passage of the SHVA. [50] There is also nothing per se discriminatory about providing for renegotiation of rates if regulations are enacted as long as the renegotiated rates are not unlawfully discriminatory. Based on the record compiled, we do not see a general pattern of unlawfully discriminatory contract clauses used by satellite carriers separate and apart from rates charged. However, for purposes of this proceeding, we have not examined all contracts in existence and are not ruling on a specific complaint of particular allegedly unlawfully discriminatory clauses in a specific contract. Our conclusion is a general one for purposes of compiling our report.

C. Are There Costs or Other Factors That Justify Higher Rates?

37. The third question posed by the *Further Notice* focuses on the cost of providing superstation and network station signals to HSD distributors. We tentatively concluded that HSD services, in all cases, caused higher costs to satellite carriers and the further information gained in this portion of the proceeding reinforces this conclusion. We must also determine whether such higher costs justify the disparities noted in the rates charged to distributors versus the rates charged to cable system operators or other program providers.

38. In support of their contentions that higher rates are justified, all satellite carriers submitted cost statements listing, in varying degrees of detail, the cost of providing HSD services either directly or through distributors. [51] These statements were provided pursuant to requests for confidential treatment, [52] as were responses to the Commission's additional specific questions sent to each individual carrier. [53] Although we will not reveal the specific details of the carriers' confidential statements, their comments discuss, in general, the types of additional expenses they rely on to justify the higher HSD rates charged.

39. Carriers typically claim the following additional expenses as those associated with providing HSD services: national advertising, authorization and deauthorization, customer service, copyright payments, anti-piracy campaign expenses, back office and other administrative costs and DBS Center costs. [54] One carrier estimates that the average cost to service each of its HSD subscribers is three times the cost of serving each of its cable subscribers. [55]

40. Rampant signal piracy was cited as a major factor in increasing the cost of providing HSD services. [56] The Commission has concluded that the industry consensus figure for the extent of HSD piracy is in the 50-60% range.[57] Carriers claim compensating for the revenue lost from theft of service results in substantially higher rates charged for HSD programming and a solution to the piracy problem would consequently cause a reduction in rates.

41. Carriers argue that spreading the undeniably higher costs of HSD distribution over a universe of customers much smaller than the universe of cable subscribers, of necessity, results in higher rates. The total universe of

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[48] The SHVA permits the reception of a particular network signal only in cases where the dish owner cannot receive an acceptable over the air broadcast signal from an affiliate of that network.

[49] *See* Reply Comments of Southern/Netlink at 18-20.

[50] NRTC also complains about a covenant not to compete in a proposed contract with Eastern, but, as Eastern points out, this contract was never signed and, in fact, NRTC chose to obtain the same service from another carrier. NRTC has not offered any evidence that it has been precluded from competing with a satellite carrier by operation of a covenant not to compete.

[51] Although NRTC has asserted that Southern/Netlink did not base their rates on specific costs incurred, cost information was filed by Southern/Netlink with their reply comments for the purpose of comparing their rates to their costs.

[52] NRTC filed a Freedom of Information Act (FOIA) request to obtain this information which was denied. Letter to John B. Richards, Control No. 90-200 (October 9, 1990). NRTC has petitioned for review of this decision.

[53] These specific questions were designed to create uniformity in the information gathered and to assist us in making accurate comparisons.

[54] *See* Comments of Superstar, Southern/Netlink, PrimeTime 24, and Eastern.

[55] Comments of PrimeTime 24.

[56] *See* Comments of Southern/Netlink.

[57] Various estimates indicate that from 50% to 80% of dish owners do not pay for the programming they receive. Inquiry into the Need for a Universal Encryption Standard for Satellite Cable Programming, 5 FCC Rcd 2710 (1990) at para. 39.

HSD customers in July 1990 was estimated to be 686,000, while the existing universe of cable customers was 54 million. Fewer HSD customers are thus required to assume higher costs, which results in higher per customer cost allocations. Similarly, carriers assert that if forced to offer HSD service at cable rates, they could not cover the cost of the HSD service [58] and thus might have to discontinue it.

42. The cost data submitted by the satellite carriers varies in many respects. For example, some provided a detailed cost breakdown with a thorough explanation, while others submitted much less detail. Carriers also differed in the type of costs claimed. Some attempted to make an allocation of transponder costs between cable and HSD, while others indicated that this was not feasible.[59] Some carriers listed substantial legal or administrative costs that others did not include and others claimed back office expenses for provision of customer service that were not claimed by all carriers. Carriers also differ in the number of stations they provide. For example, those that provide network signals only offer certain stations to eligible households [60] and thus this service is particularly customized. The number of end-user dish owners served by a carrier with or without distributors also varies by as much as several hundred thousand with some carriers serving close to half a million HSDs and others only about one quarter that number. The range of rates charged also differed by carrier.

43. An issue has been raised about the appropriate allocation of wholesale and retail costs. NRTC claims that only those carriers' costs attributable to wholesale functions can be used in justifying distributors' rates. [61] The *Further Notice* specifically requested itemization and discussion of costs involved in serving distributors as compared to the costs of providing to cable system operators, SMATV and wireless cable systems. [62]

44. The carriers, however, assert that with some of their HSD costs, it is either impossible or inappropriate to allocate them solely to retail or wholesale functions. Superstar, for example, questions whether it is possible to separate retail costs from a wholesale price structure. It states that only 3 out of its 51 distributors have tier bit access [63] and that consequently, the entire cost of retail operation is implicated in distribution to the entire HSD market. NRTC is the only HSD distributor participating in this inquiry and the satellite carriers assert that other distributors are much less involved in the distribution chain. It does appear that NRTC is unusual in the amount of support it offers its customers and that many other distributors provide far less in terms of customer service. According to Superstar, forcing satellite carriers to exclude retail costs from their wholesale business would drive carriers out of the retail business and all of the costs to provide satellite delivered superstation and network station signals would be shifted to the end user customer, not to the distributor.

45. NRTC argues that the carriers are attempting to misallocate common costs in serving retail and wholesale customers. NRTC asserts that the carriers can claim no costs for additional services for NRTC's benefit because they provide no such extra services. It estimates that the only appropriately allocable costs of wholesale delivery of a scrambled signal to HSD distributors are the cost of the tier bit at the DBS Center, approximately $3575 per month, and the cost of an activation data link between the DBS Center and the carrier's uplink facility, approximately $950 per month. NRTC claims that these costs are de minimis when evaluated on a per subscriber basis.

46. *Conclusion.* In a typical telephone rate case, the Commission could more narrowly focus on particular rates, costs and customers than the broader focus of this report allows. However, the record permits several conclusions about this market. Notwithstanding NRTC's assertion to the contrary, it is evident that costs to serve HSD distributors are higher than costs to serve cable system operators. Most satellite carriers [64] offer service to individual home earth stations directly as well as through distributors [65] and, in the absence of preexisting regulatory allocation rules, properly allocating costs at this time to retail and wholesale functions is difficult. The record indicates that there are some costs that are incurred in serving all HSD customers regardless of the involvement of a distributor and that these costs are higher than those estimated by NRTC. For example, some costs, such as the per subscriber copyright fees, must be paid by the carrier whether or not it employs distributors. In addition, the carriers claim that their national advertising is directed to all customers and thus benefits distributors by enhancing customer awareness of the programming has validity. [66] Although NRTC says that it also advertises, many other distributors do not conduct their own promotional activities and thus rely on those of the carrier. Part of the cost of advertising and promotion is therefore appropriately allocated to serving distributors as well as individual customers.

47. In addition, in many instances, carriers assert that they receive inquiries or complaints about service from customers served by distributors as well as those served directly, and often these customers do not identify the fact that they purchase programming from a distributor. Consequently, in many cases, distributors' customers are actually assisted by the carrier. Thus carriers' costs in providing customer service are currently difficult to allocate between wholesale and retail markets.

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[58] *See, e.g.*, Comments of Eastern.

[59] *See* discussion of this issue *infra* at para. 50.

[60] *See supra* note 48.

[61] In this context, the term "retail" refers to satellite carriers providing programming directly to the earth station owner. The term "wholesale" refers to the marketing of the same programming using distributors.

[62] *Further Notice* at para. 14.

[63] *See* discussion *supra* at paras. 11 and 12.

[64] One carrier states that it does not serve any HSD customers directly.

[65] Carriers vary widely in the number of retail customers they serve directly. Eastern states it has approximately 2500 retail customers while Superstar estimates that it serves many more. Eastern claims that its minimal retail business and the revenues it generates is not worth the measures that NRTC claims it has taken to preserve it.

[66] Some carrier advertising directs the consumer to call either the carrier or their local satellite dealer (*i.e.*, a distributor) to obtain service.

48. All carriers claim a substantial expenditure in connection with the industry's anti-piracy campaign. This campaign is especially important in this industry given the severe theft of service problems. While some distributors such as NRTC also contribute to this effort, other distributors do not participate and carriers' overall contributions enhance the position of all parties by attempting to ensure that programming is paid for. Thus, it would not be appropriate, as suggested by NRTC, to allocate all anti-piracy costs solely to retail service.

49. Because no distributors participate in the physical transmission of the programming, technical costs related to the DBS Center, including tier bit and data link costs, are appropriately allocable to all customers whether wholesale or retail. NRTC acknowledges this fact. Some carriers employ more than one tier bit in order to provide more customized service, [67] and the benefits of better service inure to distributors as well as to directly served customers.

50. Carriers generally did not claim costs for transponders and uplink facilities based on the fact that it was difficult to apportion these costs between its cable customers and HSD subscribers. [68] A valid argument could be made, however, that a portion of these admittedly substantial costs could be attributed to serving the HSD market, with a further breakdown in the allocation for serving distributors. However, because most carriers serve so many more cable subscribers than HSD owners, the proportional HSD share would be small. This is not true for those carriers, such as Netlink and PrimeTime 24, that provide network station signals, because relatively few cable customers receive these signals. [69] Thus, a much larger share of carriers' transponder costs to provide network stations could be allocable to HSD customers. A significant share of transponder costs would greatly increase the carriers' cost of providing service and thus explain more of the cost difference between cable and HSD distribution.

51. Comparing the cost data provided by the satellite carriers to the higher rates charged HSD distributors does, in some cases, account for a part of the price disparities. In other cases, however, the disparities are not justified and some distributors, unlike cable operators or other customers, are paying two and three times the amount the record here suggests it costs the carrier to provide service. As stated previously, the types of costs claimed by carriers differ and, in cases where a significant disparity remains, some category of costs is often excluded. However, carriers that do not claim one cost category will often include other categories and the final cost figures tend to balance out. Because this is not a rate case, carriers have not included an allowance for a rate of return. In addition, carriers did not include tax allowances in their data.

52. Taking all of these factors into consideration and even giving satellite carriers, whose practices have been challenged, the benefit of appropriate inferences, on the basis of the record before us, we conclude that while some carriers' rates to some distributors appear to be cost justified, others are not. The magnitude of unjustified disparities is smaller than NRTC's percentage differences in wholesale prices. [70] The amount of disparity varies depending on whether the rate compared is on the low or the high end of the contract range, *i.e.*, whether the distributor is getting the most advantageous price. This range may be the result of cost savings justifying legitimate volume discounts, but for those paying the higher rates, the difference between costs and rates is much greater.

53. Moreover, even seemingly wide percentage differences between rates and costs may correspond to relatively small actual differences in money amounts paid per station, per subscriber, per customer, per month. For example, in one case, a distributor's monthly rate is approximately 200% more than the cost of providing service set forth in this record, but the difference in monthly cost is $.83. On the lower end of the contract range, the rate is approximately 67% higher than the cost but results in a monthly difference of $.28. In another case, when compared to the high end of the rate scale, the rate is 100% more than the cost with a monthly difference of about $.40, while at the low end of the scale it is only $.12 more than the carrier's cost. Generally, many distributors appear to be paying between $.30 and $.80 per customer, per station, per month over what the carriers have represented the cost of service to be. In some cases, with some specific high volume distributors, the contracts show a rate very close to carriers' stated costs, but in others the disparity between rates and costs is greater.

54. A number of carriers argue the doctrine of competitive necessity justifies charging lower rates to cable operators. According to these carriers, if competitive factors warrant, an entity is permitted to lower its rates to retain customers even if it does not attain a reasonable rate of return. PrimeTime 24 states that if it lowers its rates to cable systems, it is not required to lower its rates to other customer classes where competitive necessity is not present. PrimeTime 24 urges the Commission to apply the "net benefit test" and allow price differentials rather than force it to lose the service altogether. PrimeTime 24 asserts it is convinced that if it is forced to offer uniform prices, it will have to raise cable rates, causing the defection of cable customers, and thus necessitating increased rates to HSD customers. This is not, it states, the intended result of the SHVA.

55. Our task here would be different if we were making a determination based on one specific rate from one particular carrier based on a uniform set of cost data. Our industry-wide findings in this report cannot be so precise. However, we conclude that some home dish distributors are paying rates that are substantially in excess of the rates being charged to cable companies and others, and that the extent of those rate disparities has not been adequately justified in the record before us based on the carriers' costs. Whether these disparities constitute unlawful discrimination depends on the standard that is used to determine its existence.

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[67] *See* Comments of Superstar.

[68] One reason for this is that transponder and uplink costs do not vary with the number of customers, whether cable or HSD.

[69] In some instances this is true of superstation service, where a satellite carrier will direct its service primarily to HSD customers. An example of this is Eastern's provision of WSBK.

[70] NRTC's percentage figures do not take into account any cost justification.

D. What Remedial Action Should the Commission Take?

56. The final question posed by the *Further Notice* is what appropriate remedial action should the Commission take if it finds unlawful discrimination and pursuant to what jurisdictional authority. Since the *Further Notice* was issued, NRTC has filed formal complaints with the Commission for violation of Section 202, 47 U.S.C. § 202, against Southern, Netlink and Superstar (United Video). These complaints were filed pursuant to Section 208 of the Communications Act, which is available to "[a]ny person... complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention thereof...." The information provided in this study indicates the outcome of the complaints will depend on questions of fact and law that may vary from defendant to defendant. The threshold question will be: Is the defendant a common carrier, providing common carrier services, and subject to Section 208? Other questions will be: Are like services involved? Are price differences justified by costs? Have the defendant's costs been allocated reasonably? If prices to distributors are not justified by costs, does another justification, *e.g.*, the doctrine of competitive necessity, justify price disparities? Pleadings by the parties in the complaint proceedings continue to be filed. The Section 208 complaints will be processed in the ordinary course.

57. In addition, we note that the anti-discrimination provision of the SHVA provides that aggrieved parties have a private right of action in federal court under the Copyright Act. This Commission does not have authority to enforce the Copyright Act.

III. CONCLUSION

58. Our conclusion is that, as a general matter, there are significant disparities in some of the prices charged by some carriers to home dish distributors as compared to the prices charged to cable companies and other customers for superstation and network station programming. Some of these disparities are not justified by the cost of providing service as documented in this proceeding. Applying a test like that used under Section 202(a) of the Communications Act to assess "whether. .. there exists discrimination described in Section 119(a)(6) of Title 17" (the Copyright Act) leads us to conclude that there may be violations of that Act. Specific allegations of unlawful activity under the Communications Act will be evaluated in the Section 208 complaints before us.

ORDERING CLAUSES

59. IT IS ORDERED that the Secretary send copies of this *Second Report* to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate.

60. IT IS FURTHER ORDERED that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Congressional Inquiries:

Honorable Howell Heflin
United States Senate

Honorable Larry LaRocco
House of Representatives

Honorable John W. Warner
United States Senate

Honorable Hank Brown
United States Senate

Honorable J. Bennett Johnson
United States Senate

Honorable Bud Cramer
House of Representatives

Honorable John C. Danforth
United States Senate

Honorable Mel Hancock
House of Representatives

Honorable Charles W. Stenholm
House of Representatives

Honorable Glen Browder
House of Representatives

Honorable Lloyd Bentsen
United States Senate

Honorable Sam Nunn
United States Senate

Honorable Phil Gramm
United States Senate

Honorable Walter B. Jones
House of Representatives

Honorable Bill Emerson
House of Representatives

Honorable Quentin N. Burdick
House of Representatives

Honorable Charles E. Grassley
United States Senate

Honorable Terry Sanford
United States Senate

Honorable Alan Cranston
United States Senate

Honorable Sonny Callahan
House of Representatives

Honorable William L. Dickinson
House of Representatives

Honorable Richard Shelby
United States Senate

Honorable Jim Chapman
House of Representatives

Honorable Larry Pressler
United States Senate

Honorable Wally Herger
House of Representatives

Honorable Kent Conrad
United States Senate

Honorable Gary A. Condit
House of Representatives

Honorable Dave Durenberger
United States Senate

Honorable Harold L. Volkmer
House of Representatives

Honorable Billy Tauzin
House of Representatives

Honorable William Clay
House of Representatives

Honorable Joe Barton
House of Representatives

Honorable Claude Harris
House of Representatives

Honorable Mike Synar
House of Representatives

Honorable Jim Slattery
House of Representatives

Honorable Jim Cooper
House of Representatives

Honorable Ralph Hall
House of Representatives

Honorable John Breaux
United States Senate

Honorable Barbara A. Mikulski
United States Senate

Other Letters:
Donald Lee Brown
Charles R. Abbott
Sharon T. Samuel
David E. Stoner
Roy Dale Griffin
Lyndell L. Hurt
Sidney Brooks
Cecil D. Rooks, Jr.
Norman R. Goin
Creden W. Huber
Peter M. Rudolph
Ruth Hards
William F. Sullivan
Kurt Goewert
David S. Batten
Dennis E. Crooks
Larry J. King
Johnny R. Dilda
Steven A. Glaim
William Platt, Jr.
Tom Trowbridge

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-575

In the Matter of

Amendment of Section 73.202(b), RM-7236
Table of Allotments,
FM Broadcast Stations.
(Clarksburg, West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 3, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7075 (1990), issued in response to a petition filed by the Harrison Corporation ("petitioner"), proposing the substitution of Channel 222A for Channel 224A at Clarksburg, West Virginia, and the modification of its license for Station WVHF-FM to specify operation on the alternate Class A channel. Petitioner filed comments requesting the substitution of Channel 221A in lieu of the Commission's proposed substitution of Channel 223A, and reaffirmed its intention to apply for whatever channel is allotted. No other comments were received.

2. The petitioner originally requested the substitution of Channel 222A for Channel 224A at Clarksburg, but that proposal could not be made due to a conflict with a pending proposal of Oakland Radio Station Corp. to substitute Channel 222A for Channel 221A at Oakland, Maryland (RM-7358). The Commission proposed resolving the conflict by allotting Channel 223A in lieu of Channel 222A to Clarksburg. The petitioner contends that the proposed allotment of Channel 223A would cause "significant predicted interference" to the 60 dBu service contour on Channel 226A at Barrackville, West Virginia, and proposed the substitution of Channel 221A in lieu of Channel 224A at Clarksburg.

3. In consideration of the information above, we believe the public interest would be served by substituting Channel 221A for Channel 224A at Clarksburg, West Virginia, since it would enable Station WVHF-FM to expand its coverage area. Although Channel 223A would be fully spaced to Channel 226A at Barrackville, we will substitute Channel 221A for Channel 222A at Clarksburg because the petitioner has expressed a preference for that channel, and we can accommodate that preference without affecting any other proposals. The substitution of Channel 221A at Clarksburg can be made in compliance with the Commission's minimum distance separation requirements without a site restriction at petitioner's specified site. [1] Concurrence of the Canadian government has been obtained, since Clarksburg is located within 320 kilometers (200 miles) of the U.S.-Canadian border. We will also modify petitioner's license for Station WVHF-FM at Clarksburg to specify operation on Channel 221A.

4. Accordingly, pursuant to the authority contained in Sections 4(i), (c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 19, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clarksburg, West Virginia	221A, 285A, 293B

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Harrison Corporation for Station WVHF-FM, Clarksburg, West Virginia, IS MODIFIED to specify operation on Channel 221A, in lieu of Channel 224A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WVHF-FM's license, BLH-7595, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-7595, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee, as follows:

Harrison Corporation
P. O. Box 2423
Clarksburg, West Virginia 26302-2423

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 221A at Clarksburg are North Latitude 39-15-48 and West Longitude 80-23-40.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-321

In the Matter of

Amendment of Section 73.202(b), RM-7303
Table of Allotments,
FM Broadcast Stations.
(Paragould and Lake City, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 3, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 4007 (1990), issued in response to a petition filed on behalf of North Arkansas Radio Co., Inc. ("petitioner"), licensee of Station KDXY(FM), Channel 285A, Paragould, Arkansas, proposing the allotment of its channel to Lake City, Arkansas, as a Class C3 channel, and modification of its license accordingly. Petitioner filed comments reiterating its intention to apply for Channel 285C3, if allotted to Lake City. No other comments were received.

2. We believe the public interest would be served by reallotting Channel 285A from Paragould to Lake City, Arkansas, and by modifying the license of Station KDXY(FM) to specify operation on Channel 285C3, as requested. Our determination is premised on the petitioner's showing that the reallotment to Lake City will result in a preferential arrangement of allotments. Lake City (population 1,842), [1] will be provided with a first local aural transmission service, while Paragould (population 15,214) will continue to receive local aural transmission service from Station KLQZ(FM), Channel 296A, as well as fulltime AM Station KDRS. Furthermore, the reallotment will not result in the relocation of a station from a rural to a larger urban area. Thus, in accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station KDXY(FM) to specify operation on Channel 285C3 at Lake City, Arkansas, in lieu of its present use on Channel 285A at Paragould.

3. As indicated in the *Notice*, Channel 285C3 can be allotted to Lake City at the petitioner's suggested site, located 13.6 kilometers (8.5 miles) west of the community. [2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 19, 1991** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Lake City, Arkansas	285C3
Paragould, Arkansas	296A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of North Arkansas Radio Co., Inc., for Station KDXY(FM), IS MODIFIED effective **July 19, 1991,** to specify operation on Channel 285C3 at Lake City, Arkansas, in lieu of Channel 285A at Paragould, Arkansas, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figures were taken from the 1980 U.S. Census.
[2] Coordinates used for Channel 285C3 at Lake City are 35-51-30 and 90-34-30

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 90-447

In the Matter of

Amendment of Section 73.202(b), RM-7351
Table of Allotments,
FM Broadcast Stations.
(Bowling Green, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 3, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5994 (1990), issued in response to a petition filed by Bowling Green Broadcasters, Inc. ("BGBI"), proposing the substitution of Channel 244C3 for Channel 244A at Bowling Green and the modification of its license for Station WCBZ(FM) to specify operation on the higher powered channel. BGBI filed comments restating its intention to apply for the channel, if allotted. Nashville Partners, L.P. ("NPLP"), licensee of Station WRMX(FM), Channel 242C1, Murfreesboro, Tennessee, filed comments. BGBI and NPLP filed reply comments.

2. NPLP in its comments states that it has been precluded from any increase in the height of its existing tower or the construction of any new or taller tower in the area for Station WRMX(FM) because of Federal Aviation Administration ("FAA") problems. NPLP further states that because it lacks FAA approval for an increase in its station's antenna height, its original allotment of Channel 242C was reclassified to C1 status, pursuant to MM Docket No. 80-90. NPLP states that it has now identified the existing tower of Station WXMT(TV), Nashville, Tennessee, as the least short-spaced site at which WRMX could operate with facilities equivalent to the maximum permitted for Class C1 stations. NPLP alleges that there are no other existing towers of sufficient height that can be used by WRMX without creating new short-spacings to authorized stations, applications or allotments. NPLP states that Station WRMX's proposed new transmitter site is 4.5 kilometers (2.8 miles) short-spaced to the proposed site coordinates in the *Notice* for BGBI's Channel 244C3 upgrade. NPLP contends that the grant of BGBI's proposed upgrade at the site specified in the *Notice* (36-53-00 and 86-34-20) would preclude grant of its proposal to upgrade to full Class C1 facilities. NPLP suggests that Channel 244C3 be allotted to Bowling Green with a modified site restriction of 17.3 kilometers (10.7 miles) west-southwest of the city at coordinates 36-56-00 and 86-38-12. NPLP further states that the modified site restriction will eliminate any conflict between the proposals of WCBZ(FM) and WRMX(FM), and will permit both stations to upgrade. NPLP contends that a Class C3 station operating at the modified site with an ERP of 25 kW and an antenna HAAT of 100 meters will fully cover the city of Bowling Green in accordance with Section 73.315(a) of the Rules.

3. In reply comments BGBI states that it initially disagreed with NPLP's conclusion. BGBI studied the site proposed by NPLP and confirms that NPLP's plans for improved service to Bowling Green can be accomplished at the recommended site. BGBI states that it has no objection to the modification of the coordinates for Channel 244C3 at Bowling Green. NPLP in reply comments states that since BGBI agrees with the modified site, this proceeding is no longer contested and requests expedited action.

4. We believe the public interest will be served by substituting Channel 244C3 for Channel 244A at Bowling Green, Kentucky, since it would provide the community with a wide coverage area FM station. A staff engineering analysis has confirmed that Channel 244C3 can be allotted to Bowling Green in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.3 kilometers (10.7 miles) west of the community, as requested by BGBI and NPLP. [1]

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 19, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Bowling Green, Kentucky	244C3, 252A

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WCBZ(FM), Bowling Green, Kentucky, IS MODIFIED, to specify operation on Channel 244C3 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

[1] The coordinates for Channel 244C3 at Bowling Green are North Latitude 36-56-00 and West Longitude 86-38-12.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the licensee of Station WOKH(FM), Bardstown, Kentucky.

Nelson County Broadcasting Co., Inc.
103 W. Stephen Foster Avenue
Bardstown, Kentucky 40004

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 24, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON REQUEST FOR WAIVER OR MODIFICATION OF NECA AUDIT LETTER

On May 14, 1991, Pacific Bell and Southwestern Bell Telephone Company filed a "Joint Petition for Waiver or in the Alternative Motion to Modify" the requirements of the Commission's November 9, 1990 letter to the National Exchange Carrier Association, Inc. (NECA). [1] That letter requires that NECA retain an independent auditor to examine adjustments that the Subset I companies [2] reported to NECA for 1988 and 1989, and to propose safeguards for preventing erroneous and manipulative reporting by the Subset I companies. The letter specifies that the costs of complying with the above requirements must be billed to all the Subset I companies with explicit instructions that the costs are to be charged below the line in Account 7360, Other nonoperating income.

In their petition, Pacific and Southwestern seek waiver of, or in the alternative, modification of the requirement that NECA charge the costs of the audits solely to Subset I companies. Pacific and Southwestern also seek waiver of, or in the alternative, modification of the requirement that the Subset I companies record those costs below the line in Account 7360.

Interested parties may file comments on Pacific's and Southwestern's pleading no later than June 10, 1991. Replies should be filed no later than June 24, 1991. Comments and replies should reference file number AAD 91-24. They should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy of each filing should be sent to William A. Kehoe III, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20036, and to the Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies should be available from Downtown Copy Center at (202) 452-1422.

For further information contact William A. Kehoe III at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

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[1] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990).

[2] Under Section 69.602 of the Commission's Rules, 47 C.F.R. § 69.602, Subset I companies are defined as all the Bell System Operating Companies.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2922

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: May 24, 1991; Released: May 24, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2922 to modify Virtual Telecommunications Network Service (VTNS) Option 2 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The transmittal is scheduled to take effect May 28, 1991. [1]

2. Williams Telecommunications Group, Inc. (Williams) filed a petition to suspend and investigate or provide alternative relief against Option 2 on March 14, 1991. AT&T filed a reply on March 22, 1991.

3. Williams emphasizes that Option 2 is one of the VTNS packages which was reviewed by the U.S. Court of Appeals in the *Tariff 12 Remand* [2] and, therefore, insists that the transmittal should be subject to special scrutiny. Williams Petition at 3. Williams argues that AT&T has failed to demonstrate that Option 2 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between Option 2 and AT&T's other services. *Id.* at 3-5 (also claiming that the presence of provisions protecting the customer from any damage to its premises caused by AT&T employees affords unduly preferential treatment to the Option 2 customer). Williams further alleges that even if Option 2 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and thus are discriminatory. *Id.* at 5-7.

4. Williams further asserts that Option 2 violates the Commission's policy against geographic rate deaveraging and that it is not generally available. *Id.* at 7-9. Finally, Williams claims that Option 2 is not in compliance with the private line guidelines. *Id.* at 9-11.

5. AT&T replies that Williams' petition only specifically addresses one of the revisions to Option 2 and then restates generally the objections to VTNS options that it has filed previously. AT&T Reply at 2. In response to Williams' claims of unduly preferential treatment for the Tariff 12 customer -- caused by the requirement that AT&T repair physical damage to customer premises that it causes during installation -- AT&T replies that this is one of the functional differences between VTNS services and individually tariffed services. *Id.* at 2 n. *.

6. In response to Williams' assertions that Option 2 is discriminatory, that it is not generally available, that AT&T has geographically deaveraged VTNS rates, and that AT&T has failed to comply with the private line guidelines AT&T denies those charges and cites its previously filed replies to Options 74-81. *Id.* at 3 & 3 n. *. AT&T urges the Commission to permit this option to take effect subject to the outcome of the remand proceeding, citing the previous filings which have been permitted to take effect in this manner. *Id.* at 4 & 4 n. *.

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2922, AT&T's revisions, the petition filed by Williams, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, 917 F. 2d 30 (DC Cir. 1990). Although this transmittal does not present new questions that warrant investigation at this time, it is related to the pending remand proceeding in CC Docket 87-568 because Option 2 has been expressly made a part of that proceeding. *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Order, FCC 91-29, released Feb. 1, 1991, at para. 1 n. 1. Therefore, Transmittal No. 2922 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

9. Accordingly, IT IS ORDERED that the petition to suspend and investigate or provide alternative relief from, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2922 filed by Williams Telecommunications Group, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] AT&T filed Transmittal 3131 on May 23, 1991, to amend Section 7.4.1.G, as proposed in Transmittal 2922.

[2] *MCI Telecommunications Corp. v. FCC*, 917 F. 2d 30 (DC Cir. 1990) *(Tariff 12 Remand)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Southwestern Bell Telephone Company — Transmittal Nos. 2062 and 2094

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: May 24, 1991; Released: May 24, 1991

By the Chief, Common Carrier Bureau:

1. On January 18, 1991, Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2062 to restructure its DS3 services, termed MegaLink Custom Services, from its current rate matrix structure to a more conventional structure consisting of optical and electrical channel terminations and channel mileage. The Competitive Communications Association (Comptel) filed comments opposing Transmittal 2062, and Communications Transmission, Inc. (CTI), MCI Telecommunications Corporation (MCI), and Williams Telecommunications Group, Inc. (WTG), filed petitions to reject or to suspend and investigate Transmittal 2062. SWB subsequently filed a reply to the petitions. On April 22, 1991, SWB filed Transmittal No. 2094 to modify Transmittal 2062. The tariff revisions contained in those transmittals are scheduled to become effective on May 25, 1991.

2. Under Transmittal 2062, SWB would change the current rate structure for its Megalink Custom Services, including electrical, optical, and dark fiber services. SWB says that the restructure will simplify the current offering, which is a rate matrix including hundreds of charges based on service term commitment, distance, and volume. The new rates offer service on a month-to-month, 3 year, 5 year, or 10 year basis, with channel terminations of 1, 3, 6, or 12 DS3 optical or electrical interfaces. SWB will charge fixed channel termination rates, interoffice mileage rates based on the volume option selected by the customer, plus a fixed "per DS3" interoffice rate. SWB also would establish a termination charge after one year of service equal to 60 percent of the payments remaining in the service commitment period. SWB Transmittal 2062, Description and Justification at 1-14.

3. Transmittal 2094, *inter alia*, retains the tariff terms and conditions applicable to its existing, or "vintage" Custom MegaLink Service rates. SWB also reorganized the information that was contained in its initial filing so that the actual price index for the special access basket, the service band index for the high capacity/DDS category, and the DS3 subindex are easily identifiable and appear on one page. In addition, SWB explains how demand for DS3 service under the existing rate structure flows through and relates to demand for DS3 service under the restructure. CTI, MCI, and WTG filed petitions against Transmittal 2094, to which SWB replied.

4. The petitioners argue that SWB has not complied with the guidelines set forth in the Commission's *Price Cap Order*.[1] CTI and WTG assert that SWB's restructured rates pierce SWB's subindex band limit and, as a result, SWB is obligated to explain the cause of such increases. CTI Petition at 15; WTG Petition at 2. MCI claims that SWB has not demonstrated that this restructure will not result in unreasonable discrimination among service users. MCI Petition at 1, 7. The restructure significantly affects DS3 rate structures, particularly with regard to length of haul and quantity discount. MCI claims that the restructure will allow SWB to assign an overwhelming proportion of the revenue stream from DS3 service to the "monopoly" channel termination rate element, at the expense of mileage driven charges. Thus, argues MCI, small users would receive a substantial discount while large users would experience a dramatic increase in their DS3 rates. *Id.* at 3-4.

5. CTI argues that customers who have entered into contracts but who will not receive service until after the tariff revisions become effective should be "grandfathered" or receive the "vintage" rates. CTI Petition at 19-20. CTI asserts that the *RCA Americom* decisions[2] prohibit a carrier from unilaterally changing contractual arrangements for long-term service offerings absent sufficient justification. In addition, CTI, as well as the other petitioners, complain that their DS3 rates will increase unreasonably under the MegaLink Custom Services restructure. *See e.g.*, Comptel Comments at 1; CTI Petition at 22; MCI Petition at 3-6; WTG Petition at 4. MCI also suggests that SWB's restructure results in strategically priced DS3 rates. MCI Petition at 3, 5, and 6.

6. SWB replies that its restructure filing complies with all price cap rules. Specifically, SWB claims that its restructure is a within band filing and therefore it is not required to produce a full description and rationale for the restructure, as MCI contends. SWB Reply at 2-8. SWB further claims that the price cap rules consider aggregate price levels, not changes in the price of a particular rate element or a particular customer's service. *Id.* at 8-15. In response to accusations that it strategically set its restructured rates, SWB asserts that price cap regulation eliminated strategic pricing guidelines for local exchange price cap carriers. *Id.* at 15. Finally, SWB asserts that it is required to charge the tariff rates in effect when a service is delivered to a customer and that compliance with this requirement does not violate the *RCA Americom* standard. *Id.* at 16-20.

7. The petitions against Transmittal 2094 basically restate the arguments the petitioners made against 2062, with the exception of CTI, which makes several new arguments. CTI argues that: the restructure will terminate the customer premises-to-customer premises service which SWB contracted to provide CTI; the Commission's investigation of SWB's dark fiber rates should be considered with respect to SWB's instant filing; the Commission cannot accept the cost justification for DS3 or "lit" fiber service if it finds that rates for dark fiber service are not cost justified; SWB's filing does not constitute a "restructure" under price cap regulations; and that SWB's termination liability charge of 60 percent of the remaining payments due on a contract terminated by the customer prior to its expiration date is not justified; and

SWB's restructured rates will be discriminatory because different rates will apply before and after the restructure takes effect. CTI Tr. 2094 Petition at 2-20.

8. SWB reiterates its assertions that the restructure complies with all price cap rules and asserts that its rates are not discriminatory. SWB Tr. 2094 Reply at 2-12. In addition, SWB asserts that its restructure does not terminate a service, is not a new service offering under price caps, and that its termination charges are proper. SWB maintains that there will be no discrimination between rates before and after the effective date of the restructure, and that customers who establish service before the effective date will be locked into the vintage rates while customers establishing service after that date will be charged the restructured tariff rates. SWB 2094 Reply-CTI at 2-8.

9. SWB's restructure contains rates for its dark fiber service which are currently under investigation in CC Docket No. 88-136. *See* Bell Atlantic Telephone Companies, *et al.*, CC Docket No. 88-136, Memorandum Opinion and Order, 5 FCC Rcd 1436 (Com.Car.Bur. 1991). SWB's restructured dark fiber rates were filed prior to the suspension of SWB's general dark fiber rates. Therefore, we have determined that those portions of Transmittals 2062 and 2094 that pertain to dark fiber rates should be suspended until July 22, 1991, and incorporated into the Commission's investigation of general dark fiber rates in CC Docket No. 88-136.

10. The Common Carrier Bureau has reviewed Southwestern Bell Telephone Company Transmittals 2062 and 2094, the petitions filed by Comptel, CTI, MCI, and WTG, and all related submissions and pleadings. We conclude that, with the exception of that portion of the restructure that pertains to dark fiber rates, no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

11. Accordingly IT IS ORDERED that the portion of Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 2062 and 2094, that pertain to dark fiber rates, terms, and conditions, ARE SUSPENDED until July 22, 1991, and ARE INCOPRPORATED into the Commission's investigation of general dark fiber rates in CC Docket No. 88-136.

12. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company shall file a supplement reflecting the suspension of its dark fiber rates, terms and conditions no later than five business days from the release date of this Order. For this purpose, Special Permission No. 91-414 is assigned.

13. IT IS FURTHER ORDERED that the petitions to reject or to suspend and investigate Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 2062 and 2094, filed by Communications Transmission, Inc., MCI Telecommunications Corporation, and Williams Telecommunications Group, Inc., ARE GRANTED to the extent indicated above, but otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (*Price Cap Order*); Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, FCC 91-115, released Apr. 17, 1991 (*Price Cap Reconsideration Order*).

[2] CTI Petition at 17-20 (*citing* RCA Americom Communications, Inc., 84 FCC 2d 353 (1980) (*RCA Investsigation Order*); 86 FCC 2d 1197 (1981) (*RCA Rejection Order*); 2 FCC Rcd 2236 (1987) (*RCA Reconsideration Order*)).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-34

In the Matter of

Bundling of Cellular Customer
Premises Equipment and
Cellular Service

ORDER

Adopted: May 24, 1991; Released: May 28, 1991

By the Chief, Common Carrier Bureau:

1. On May 10, 1991, the National Association of Cellular Agents (NACA) requested an extension of time to file comments in the Commission's Notice of Proposed Rule Making (Notice) in the above-referenced docket.

2. NACA states that the deadline for filing comments should be extended by 90 days because of "a required 2 1/2 month lead time for industry trade publications to publicize the Commission's request for comments." NACA further states that any Commission decisions on the issue of bundling cellular customer premises equipment with cellular service will have a long lasting and economic impact on millions of telecommunications service subscribers, and that "[c]ellular subscribers and their children will pay dearly for any decisions not based on their best interest."

3. The Commission carefully considered the amount of time the public would require to offer comments in response to the Notice, which was released on March 27, 1991. *See also* 56 Fed. Reg. 16050 (April 19, 1991). We believe that the period from official release of the Notice through May 20 was adequate for industry publication of the issues and preparation of meaningful comments. We cannot find that NACA has shown good cause for the requested 90 day extension of time. Accordingly, NACA's request is denied.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Acceptance of 220-222 MHz
Private Land Mobile Applications

ORDER

Adopted: May 24, 1991; Released: May 24, 1991

By the Chief, Private Radio Bureau:

1. On March 14, 1991, the Commission adopted service rules for private land mobile use of the 220-222 MHz spectrum.[1] The Commission provided that applications for this new spectrum would be accepted beginning the second day after publication of a summary of the *Report and Order* in PR Docket No. 89-552 was published in the Federal Register. The summary of that *Report and Order* was published in the Federal Register on April 29, 1991.[2] The Commission began accepting applications for the 220-222 MHz frequency band on May 1, 1991.

2. The Licensing Division typically receives in the neighborhood of 10,000 applications per month for the land mobile radio services administered by the Bureau. In the past three weeks, however, the Licensing Division has received well over 50,000 applications just for the 220-222 MHz band. This influx of applications has created, at a minimum, an additional workload of one-half year for the entire Licensing Division.

3. Effective midnight May 24, 1991, no new applications for the 220-222 MHz band will be accepted for filing by the Federal Communications Commission. Applications for the 220-222 MHz band filed on or after May 25, 1991, will not be accepted for filing. [3]

4. This action is necessary to permit the Bureau to begin the sizable administrative task of processing the applications for the 220-222 MHz band and preparing for any necessary lotteries for applications in this band.[4] This action is also necessary to permit the Bureau to continue to process pending applications in all other radio services it administers without severely adversely affecting speed of service.

5. This action will not place prospective applicants for the 220-222 MHz frequency band at a disadvantage, because applications are considered on a first-come, first-served basis from day-to-day.[5] Any applications that would have been filed from this point forward would have been considered only after all other pending applications had been resolved. The relative position of any new applications with respect to all previously filed applications will thus remain unchanged irrespective of whether these new applications were filed in the near future or, alternatively, at such time as the freeze is lifted. Additionally, prospective applicants are not prejudiced by this action because they will have complete access to any available spectrum remaining after we have completed processing of applications already on file.

6. This action is taken pursuant to the provisions of Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j), and Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331.[6] This freeze on Commission acceptance of applications for the 220-222 MHz band will remain in full force and effect until such time as additional action is taken to resume acceptance of these applications.

7. For further information contact the Consumer Assistance Branch, Licensing Division, Private Radio Bureau, (717) 337-1212.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] *Report and Order*, PR Docket No. 89-552, FCC 91-74 (April 17, 1991).

[2] 56 Fed. Reg. 19598 (1991).

[3] Because imposition of this freeze on acceptance of 220-222 MHz applications is procedural in nature, it is not subject to the notice and comment provisions of the Administrative Procedure Act (APA). *See Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963). Further, because this freeze is procedural in nature it is not subject to the 30 day effective date provisions of the APA. In any event, good cause exists to place the freeze on acceptance of 220-222 MHz applications in immediate effect because advance notification would likely prompt the filing of additional applications and thus defeat the administrative purpose of the freeze.

[4] This action is *not* in any way related to the Emergency Motion for Stay in PR Docket No. 89-552 filed by Walker, Bordelon, Hamlin, Theriot & Hardy on behalf of itself and Ashton R. Hardy and Bradford D. Carey. This action is purely administrative in nature, and reflects no consideration of the merits of the pending Emergency Motion for Stay. Nor does it constitute any ruling upon the pending Emergency Motion for Stay.

[5] *See Report and Order*, PR Docket No. 89-552, FCC 91-74 (April 17, 1991), at paras. 56-59; 47 C.F.R. § 90.711(a); *Public Notice*, Report No. 12666 (April 17, 1991), at pages 4-5.

[6] The Commission has broad discretion to freeze acceptance of new applications. *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963). This action is akin to and consistent with prior actions taken by the Commission and by delegated authority to freeze acceptance of applications in certain radio services where the public interest, convenience and necessity warrant such action. *See, e.g., Order*, 5 FCC Rcd 2136 (1990) (action by the Commission restricting acceptance of AM broadcast applications); *Public Notice*, 1 FCC Rcd 1264 (1986) (action by the Commission placing a temporary freeze on acceptance of AM daytime broadcast applications); *Public Notice*, Report No. 1207 (December 6, 1983) (action by the Private Radio Bureau suspending filing of 2.5 GHz applications).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Telephone System Companies — Transmittal No. 273

Revisions to Tariff F. C. C. No. 5

ORDER

Adopted: May 28, 1991; Released: May 28, 1991

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On January 29, 1991, the United Telephone System Companies (United) filed Transmittal No. 273 to offer 64 Kbps Special Access High Capacity Service. According to United, 64 Kbps service would provide greater information carrying capacity than United's currently available 56 Kbps digital data channel. Description and Justification (D&J). The service would be available between two customer designated premises, between a customer designated premises and a telephone company hub, or between two telephone company hubs. *Id.* MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 273 on February 13, 1991; [1] United filed its opposition on February 27, 1991. Transmittal 273 is scheduled to become effective on May 29, 1991. For the reasons discussed below, we initiate an investigation of the rates for 64 Kbps service.

II. SUMMARY OF PLEADINGS

A. Petition

2. In its petition, MCI contends that the rates are significantly above costs, and raises serious concerns about the regulation of new services under price caps. MCI Petition at 1. MCI first reargues its petition for reconsideration of the *LEC Price Cap Order,* [2] objecting to use of the net revenue test for new local exchange carrier (LEC) services. *Id.* at 1-2. MCI then argues that United has filed rates that are far in excess of costs -- as high as 405 percent of its revenue requirement. *Id.* at 2. In addition, MCI claims that the rates for 64 Kbps service have no relationship to costs because United developed these rates by performing a linear regression of all existing digital data service rates. *Id.* at 2. It argues that this ratemaking method does not guarantee a relationship between price and costs. *Id.* MCI observes that the Commission recently rejected a tariff filed by the Ameritech Operating Companies (Ameritech) because Ameritech failed to establish a relationship between price and costs. *Id.* at 3 (citing Ameritech Operating Companies Transmittal No. 483, 6 FCC Rcd 694 (Com. Car. Bur. 1991)).

B. Reply

3. In its opposition, United responds that MCI's petition is merely a collateral attack on the application of the net revenue test to price cap tariffs. United Opposition at 2. United asserts that it complied with the Commission's tariff filing requirements by submitting cost data, revenue data, usage projections, and data showing compliance with the net revenue test. *Id.* at 2. United further argues that 64 Kbps service logically should have a higher rate than lower speed services in order to maintain a price continuum between slower and faster speed services. *Id.* at 2-3. United then argues that its extrapolation of current rates was reasonable because those earlier rates were cost supported. *Id.* at 3.

4. United also responds that MCI's claim that its 64 Kbps rates are excessive because they exceed the revenue requirement is wrong because MCI "compares bottom-up costs to rates." *Id.* at 3-4. United explains that "bottom-up" costs are only directly assignable costs. In contrast, says United, "revenue requirement" is a regulatory term which encompasses "topdown" costing methodology pursuant to Part 69 of the Commission's Rules. According to United, the overall "return" on 64 Kbps service and other previously accepted Special Access services is comparable and is based on the previously approved 11.25 percent return level. *Id.* at 4. Finally, United argues that MCI's analogy to Ameritech Transmittal 483 is misplaced. According to United, the Commission found that Ameritech failed to supply the necessary data to comply with the applicable rules and establish a relationship between costs and rates. *Id.* at 5. United claims that because it provided cost support, demand and revenue forecasts, and net revenue information, its filing fully complies with the applicable rules, and the cost support establishes a relationship between costs and revenues. *Id.* at 5-6.

III. DISCUSSION

5. The Common Carrier Bureau concludes, based on our review of Transmittal 273 and the associated pleadings, that the possibility exists that Transmittal 273 contains unreasonably high rates for 64 Kbps service in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). Because customers may be subject to excessive rates as a result of this new service, we will suspend the offering for one day, impose an accounting order, and initiate an investigation into the reasonableness of these rates. [3] We will designate the issues to be examined in this investigation in a future Order.

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[1] On February 21, 1991, MCI filed an erratum to its petition because MCI's original filing omitted Exhibit 1.

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) *(LEC Price Cap Order), reconsideration,* FCC 91-115, released Apr. 17, 1991 *(Reconsideration Order).*

[3] The Common Carrier Bureau has determined that a longer suspension would not be in the public interest. Allowing this transmittal to become effective will immediately provide customers with a service which offers greater information carrying

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by the United Telephone System Companies in Tariff F. C. C. No. 5, Transmittal No. 273.

7. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by United Telephone System Companies ARE SUSPENDED for one day.

8. IT IS FURTHER ORDERED that United Telephone System Companies SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order. Special Permission No. 91-438 is assigned for this purpose.

9. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, United Telephone System Companies shall keep accurate account of all amounts received pursuant to the rates which are the subject of this investigation.

10. IT IS FURTHER ORDERED that the petition to suspend and investigate United Telephone System Companies Transmittal No. 273 filed by MCI Telecommunications Corporation IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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capacity than is now available from United. Therefore, the Bureau does not wish to delay United's implementation of this new service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth's Petition for
Declaratory Ruling or,
Alternatively, Request for
Limited Waiver of the CPE
Rules to Provide Line Build
Out (LBO) Functionality as
a Component of Regulated
Network Interface Connectors
on Customer Premises.

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 1991; Released: June 6, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Before the Bureau is a Petition for Declaratory Ruling and Alternative Request for Limited Waiver of the Customer Premises Equipment (CPE) Rules (Petition) filed by BellSouth Corporation, on behalf of its telephone operating companies, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (collectively BellSouth or Petitioner). BellSouth requests a declaratory ruling that the Commission's rules currently allow line build out functionality (LBO) to be provided as regulated network interface equipment. Alternatively, BellSouth requests a waiver of the Commission's rules to allow such provision. Public Notice of the Petition appeared on December 29, 1988. [1] For the reasons discussed below, we deny the Petition.

II. BACKGROUND

2. In a DS 1 circuit, [2] LBO attenuates strong signals emitted by CPE where the distance between regenerators or between a regenerator and the transmit/receive equipment may be short. By attenuating the signal, LBO prevents the signal power delivered by the CPE source device from being too high for the telephone company transport media to handle. When the signal delivered by the CPE into the network exceeds acceptable levels, network harm can result. [3] Most pre-Computer Inquiry [4] network channel terminating equipment (NCTE) [5] included this capability. [6] Currently, all NCTE registered under Part 68 of the Commission's rules must be capable of performing LBO functionality. A brief history of the unbundling of NCTE reveals the origin and function of present day LBO.

3. *Unbundling NCTE and attendant functions.* In Amendment of the Commission's Rules Concerning Connection of Equipment, Systems and Protective Apparatus to the Telephone Network, *Notice of Proposed Rulemaking (Interconnection Order I)*, CC Docket No. 81-216, 94 FCC 2d 5 (1983), *recon. denied*, FCC 84-145 (released April 27, 1984), the Commission unbundled and detariffed NCTE from network facilities. The Commission held that telephone common carriers had failed to justify restrictive tariff provisions prohibiting customers from providing their own terminal equipment employed in conjunction with carrier provided digital transmission services. The Commission stated that the equipment would be considered CPE under *Computer II*. [7] It concluded that:

> [W]e find no technical, legal or policy justification for restricting independent manufacturers from providing CSUs or digital NCTE to digital service subscribers. We fail to be convinced that AT&T has met its burden of showing that independent provision of CSUs or digital NCTE would be publicly detrimental.

Interconnection Order I, 94 FCC 2d at 22. The effect of the order was to require carriers to unbundle all CSUs, CSU-like devices, and digital NCTE so that any rates and

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[1] 3 FCC Rcd 7328 (1988). Comments were filed by: Ameritech Operating Companies (Ameritech), American Telephone and Telegraph Company (AT&T), Avanti Communications Corporation (Avanti), Bell Atlantic Telephone Companies (Bell Atlantic), Fujitsu America, Inc. (Fujitsu), GTE Service Corporation (GTE), Independent Data Communications Manufacturers Association (IDCMA), Kentrox Industries, Inc. (Kentrox), Larse Corporation (Larse), Larus Corporation (Larus), Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (collectively referred to herein as US West), North American Telecommunications Association (NATA), NYNEX Telephone Companies (NYNEX), Pacific Bell and Nevada Bell Telephone Companies (Pacific Bell), Southwestern Bell Telephone Company (Southwestern Bell), United States Telephone Association (USTA), U. S. Sprint (Sprint), and Verilink Corporation (Verilink). Reply comments were filed by: Secretariat to the American National Standards Institute - Accredited Standards Committee T1-Telecommunications (ANSI), BellSouth, GTE, IDCMA, US West, NATA, USTA, and Verilink.

[2] A DS 1 circuit operates at 1.544 million bits per second (Mbps). The BellSouth Petition encompasses only DS 1 service.

[3] Southwestern Bell Comments at 1, Bell Atlantic Comments at 1.

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations *(Computer II)*, 77 FCC 2d 384 (Final Decision), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F. 2d 198 (DC Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983), *second further recon.*, FCC 84-190 (released May 4, 1984).

[5] Terminal equipment used in conjunction with carrier provided digital services is generally referred to as network channel terminating equipment (NCTE) or channel service units (CSU). The NCTE or CSU provides a controlled, amplitude balanced interface in a modified bipolar format to the customer's data equipment.

[6] AT&T Comments at 4.

[7] *See supra*, note 4.

charges associated with these devices, when provided by AT&T, were stated as separate rate elements on an unregulated basis. [8]

4. In *Interconnection Order I*, the Commission noted that a possible source of network harm might be high amplitude pulses or voltages emanating from the unbundled data equipment, creating levels that exceed the capabilities of the network. To alleviate this concern, the Commission concluded that CSUs registered under Part 68 should include means of preventing such pulses or voltages from entering the network. [9] Previously, components in the reshaping or regeneration circuitry of the NCTE, *viz.*, transformers and varistors, provided that function. [10] The Commission intended that unbundled NCTE would continue to provide this functionality. The Commission offered for comment proposed technical standards to permit registration of CSUs and NCTE under Part 68 which, among other things, would require that excessive signals be attenuated to protect the network from harm. [11]

5. The Commission adopted the proposed standards in the *Second Report and Order* in CC Docket No. 81-216 *(Interconnection Order II)* 49 Fed. Reg. 48714 (Dec. 14, 1984), *recon.*, FCC 85-564 (released Oct. 25, 1985). The Commission noted that the Bell Operating Company (BOC) and IDCMA proposals on maximum signal strengths revealed substantial similarities and that no party had suggested that these proposals would interfere with existing services, or would be difficult or burdensome for equipment manufacturers. [12] The Commission amendments to Part 68, establishing NCTE attenuation requirements for connection to 1.544 Mbps digital (DS 1) service require:

> (ii) Output Pulse Templates
>
> The registered terminal equipment shall be capable of optionally delivering three sizes of output pulses. The output pulse option shall be selectable at the time of installation.

47 C.F.R. Section 68.308(h)(2)(ii). The three selectable output pulses are commonly termed options A, B, and C. 47 C.F.R. Section 68.308(h)(2)(ii)(A), (B) and (C). Each option has specific signal power attenuation capabilities and is selected at the time of installation depending upon the level of attenuation needed to protect the network and avoid crosstalk. [13] The signal voltage at the network interface must be limited so that the range of pulse amplitudes received at the first telephone company regenerator is controlled to within ± 4dB. This limitation is achieved by implementing the appropriate output pulse option as a function of telephone company cable loss [14] as specified at the time of NCTE installation. 47 C.F.R. Section 68.308 (h)(2)(iii). [15] The circuitry which performs the attenuation and which includes options A, B and C is referred to as LBO and the actual attenuation is commonly termed LBO functionality. Commenters in this proceeding use the term "joint engineering" to refer to the activities which occur between the telephone company and the CPE installer to establish the appropriate LBO option.

6. *The Waiver Standard.* Having unbundled NCTE and its various functions, the Commission recognized that circumstances could arise when carrier provision of some of these functionalities might be necessary and in the public interest. Thus, the Commission turned to the task of defining appropriate standards for consideration of telephone company requests to deviate from the unbundled status of NCTE and its functions. In *Interconnection Order I*, while unbundling NCTE generally, the Commission noted that:

> [t]echnical and operational concerns have been raised; but, in our view, they are not insurmountable, and, in fact, represent relatively minor problems which can be addressed and solved. Nevertheless, in an abundance of caution we shall seek to create a mechanism by which carriers might, upon appropriate showing, supply NCTE in conjunction with loop facilities if exigencies exist which have not been demonstrated to be applicable to the CSU devices. [16]

The Commission stated that any such circumstances would be addressed on an ad hoc basis, and carriers would have the burden of persuasion that the general policy in favor of unregulated supply of NCTE should be altered in specific circumstances. [17] The Commission rejected the notion that NCTE be supplied exclusively by carriers as part of the regulated network, stating, "we foresee no possibility under which this principle might be varied." [18]

7. Later, in *Computer III*, [19] the Commission reexamined the question of an appropriate waiver standard. The Commission requested comment on whether certain subsets of NCTE functions, such as circuit ter-

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[8] *Id.*

[9] *Interconnection Order I*, 94 FCC 2d at 19.

[10] *Id.*

[11] *Id.* at 30-31

[12] *Interconnection Order II*, 49 Fed. Reg. at 48716, para. 6.

[13] Crosstalk refers to noises heard in a channel when currents from one channel interfere with those of another. Crosstalk may happen when pairs of wire are positioned parallel to each other in a cable.

[14] Cable loss refers to the attenuation in signal strength that occurs as the signal is transmitted over the local loop, from the CPE to the network's first regenerator.

[15] *See* 47 C.F.R. 68.308(h)(2)(iii):

Terminal Equipment

Cable loss at 772 kHz (db)	Output pulse	Loss at 772 kHz
15 to 22	Option A	0
7.5 to 15	Option B	7.5
0 to 7.5	Option C	15.0

[16] *Interconnection Order I*, 94 FCC 2d at 20.

[17] *Id.*

[18] *Id.* at 21.

[19] *See* In the Matter of Amendment to Sections 64.702 of the Commission's Rules and Regulations *(Third Computer Inquiry) Notice of Proposed Rulemaking (Computer III NPRM)*, 50 Fed. Reg. 33602 (August 20, 1985), *Supplemental Notice of Proposed Rulemaking, Phase II (Supplemental Notice)*, 60 R.R. 2d 603 (1986), *Report and Order (Computer III Phase II Order)*, 2 FCC Rcd. 3072 (1987), *recon. (Computer III Phase II Reconsideration)*,

mination, signal conditioning, loopback testing, and multiplexing might be accorded special regulatory status, allowing telephone company provision of these services on a regulated basis. [20] The "signal conditioning" referred to in that proceeding encompasses the function which Petitioner now terms line build out. The Commission concluded that only loopback testing would be accorded special regulatory status. [21] The Commission granted a general exception from CPE treatment for loopback testing, stating that such functionality would permit carriers to improve the efficiency and reliability of their regulated services. In analyzing the necessity for future waivers or CPE policy deviations, the Commission concluded that:

> While additional NCTE functions were proposed by various parties as appropriate for carrier provision on a regulated basis, the case for each is less convincing than that for remote loopback testing from the demarcation point. This is particularly so in light of our recent relaxation of the Computer II structural separation requirements to permit BOC provision of NCTE as unregulated CPE on an unseparated basis. Accordingly, at this time we decline to permit tariffed provision of other NCTE functions by carriers through network equipment placed on customer premises. We will, however, entertain requests on a case-by-case basis for waiver of this prohibition only if the carrier demonstrates that the offering of the particular functions as part of network service will serve the public interest by *increasing the efficiency, or making technically possible the delivery, of a particular service, and that provision of those functions through unregulated CPE will not permit attainment of comparable efficiencies or service offerings.* [22]

The Commission noted that while this waiver standard would replace the standard previously articulated in *Interconnection Order I*, the circumstances that would potentially support a waiver grant would include, but not be limited to, those articulated in that order -- i.e., situations in which there are unusually wide variations or instability in loop characteristics or where facilities are frequently changed or subject to unusual interference. [23]

8. *ANSI Standard for DS 1 Metallic Interface.* BellSouth states that its Petition stems from its desire to implement the American National Standard for Telecommunications-Carrier to Customer Installation - DS 1 Metallic Interface BSR T1.405 (ANSI standard). The standard calls for a single pulse template and a uniform signal level from the NCTE to the interface. [24] BellSouth argues that the standard places additional burdens for signal power monitoring on carriers. While the standard does not mandate any particular method for accomplishing signal power control, BellSouth believes that LBO in the regulated network interface is the most efficient manner to implement the new ANSI standard.

9. This standard was processed and approved for submittal to the American National Standards Institute (ANSI) by the Accredited Standards Committee on Telecommunications, T1. [25] ANSI states that approval of an ANSI standard requires verification by ANSI that the requirements for due process, consensus, and other criteria for approval have been met by the standards developer. Consensus is established when in the judgment of the ANSI Board of Standards Review, substantial agreement has been reached by directly and materially affected interests. ANSI states that substantial agreement means much more than a simple majority, but not necessarily unanimity. Consensus requires that all views and objections be considered, and that a concerted effort be made toward their resolution. [26] The use of American National Standards is completely voluntary; their existence does not in any respect preclude anyone, whether he has approved the standards or not, from manufacturing, marketing, purchasing, or using products, processes, or procedures not conforming to the standards. [27]

III. POSITIONS OF THE PARTIES

10. BellSouth requests a declaratory ruling that LBO functionality for DS 1 service falls within the scope of "jacks and connectors", exempt from CPE classification by Part 68 of the Commission's Rules, 47 C.F.R. Part 68.[28] BellSouth states that LBO is currently used in network equipment placed on customer premises to perform loopback testing for digital services, as authorized by the Commission in *Computer III Phase II Order*. BellSouth argues that the same LBO could be used to provide signal power coordination for both looped test signals and customer generated signals. BellSouth acknowledges, however, that the Commission's *Computer III Phase II Order* states that "the NCTE functionality provided to supply the loopback test may be used only for that purpose." [29] BellSouth states that this language has created some un-

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3 FCC Rcd. 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir. pet. for rev. filed May 13, 1988). In light of a recent court decision in Phase I of the *Third Computer Inquiry* the Commission has initiated a rulemaking that would, *inter alia*, reaffirm the waiver standard adopted in Phase II of the proceeding. *See* Computer III Remand Proceedings, CC Docket No. 90-368, FCC 90-283, released August 6, 1990.

[20] *See Computer III NPRM*, 50 Fed. Reg. at 33604; *Supplemental Notice*, 60 R. R. 2d at 710.

[21] When provided by equipment on the carrier's side of the demarcation point, loopback testing permits carriers to distinguish technical problems in customer-owned inside wiring and CPE from problems in the network plant without the necessity of dispatching a service technician. *Computer III Phase II Order*, 2 FCC Rcd. at 3105.

[22] *Computer III Phase II Order*, 2 FCC Rcd. at 3105 (emphasis added) (footnotes omitted).

[23] *Id.* at 3120 n. 538-539.

[24] *See* ANSI, American National Standard for Telecommunications: Carrier-to-Customer Installation -DS1 Metallic Interface (1989) (hereinafter "DS 1 Metallic Interface").

[25] The T1 Committee is a standards developing committee of the Exchange Carriers Standards Association. Committee T1 has been accredited by ANSI as a standards setting body which can submit standards for approval and adoption by ANSI. The DS 1 interface standard was adopted as an American standard by ANSI on February 22, 1989.

[26] *See* ANSI, DS1 Metallic Interface at 1.

[27] *Id.*

[28] Petition at 2.

[29] Petition at 3 (citing *Computer III Phase II Order*, 2 FCC Rcd. at 3105, para. 232).

certainty as to whether a waiver is needed to provide LBO as part of regulated DS1 service. Thus, BellSouth requests clarification by declaratory ruling to allow network provision of LBO. Alternatively, BellSouth argues that should the Commission determine that a waiver is necessary, the NCTE waiver standard is fully satisfied.

11. All five regional Bell Companies filing comments support the petition, [30] urging that it is the most efficient and cost effective method of implementing the ANSI interface standard. They argue that the Commission never dealt with network provision of LBO functionality under circumstances in which an industry standard has rendered its provision by CPE unnecessary and inappropriate. [31] Thus, they request approval of the petition by declaratory ruling. If the Commission still views the prohibition contained in the *Computer III Phase II Order* as applicable, the Bell Companies argue that a waiver should be granted because the public interest is served by facilitating telephone company compliance with an industry standard in a manner that cannot be achieved via unregulated CPE. [32] The Bell Companies state that increased efficiency without cost to the customer is achieved by eliminating the burden of joint engineering. [33] They argue that joint engineering puts the responsibility for signal level coordination on the telephone company and the customer. This, they claim, sometimes results in false trouble signals to the telephone company. They add that improperly set LBO functions on the CPE causes service "down time". [34] The Bell Companies also argue that granting the petition poses no increased costs to the customer, because the same functionality that is currently used with loopback testing can be utilized to provide signal level attenuation.[35] Ameritech states that network interface LBO will not affect the competitive provision of NCTE because customers will still need NCTE to perform other functions associated with DS1 communications.[36] US West argues that the efficiencies derived from a single, technology independent interface are lost if two separate LBOs are required -- one in the loopback and one in deregulated CPE.[37] It also notes, however, that in customer installations that are physically expansive, such as large buildings, college campuses, or military bases, CSU LBO capability will still be required for coordination between equipment units within the customer's internal network.[38] The CSU LBO would be set to the 0 dB position when connected to telephone company provided DS 1 channels, but to some other position when used to coordinate signal levels within the customer's private network. [39]

12. For its part, GTE favors grant of the petition but states that, if LBO is optional for the local exchange carrier, the CPE would still need to be made with the LBO function because one would not know whether a particular interface contained the function or not. [40] GTE states that the FCC should propose requiring network LBO at some future date. [41] With mandatory network LBO there would be no Part 68 requirement for CPE to generate all three LBO settings, but manufacturers could do so if they desired it for other customer purposes. [42] GTE suggests an interim waiver is needed pending revisions to Part 68 to permit carrier provision of LBO. [43]

13. Several NCTE manufacturers have expressed support for the petition. [44] They state that although LBO is currently supplied with registered equipment, simplifying coordination of signal levels at the interface would be a significant benefit. [45] Verilink suggests that all CPE should be adjusted to Option A at installation; it argues that manufacturers would be free to retain LBO in the CPE and would be free to reduce their CPE price. [46] If the Commission decides that a declaratory ruling cannot issue, Verilink believes it should grant a waiver under the NCTE waiver standards in *Computer III Phase II*. [47] FAI expresses industry commitment to the ANSI standard. FAI states that transmission path LBO is economically and technically far more efficient than other methods of coordinating signal power. [48] FAI states that full binder path group separation as an alternative method of implementing the ANSI interface standard is too administratively burdensome and expensive, requiring change of the entire cable assembly from one end to the other. [49] All equipment manufacturers condition their support for the Petition by insisting that they be allowed to continue to provide LBO in NCTE regardless of the provision of LBO at the interface. [50]

14. AT&T supports the petition but states that it would be redundant to require CPE to provide LBO functionality if it is already contained in the network interface. [51] U.S. Sprint states that interexchange carriers represent a segment of the T1 Standards Committee and

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[30] *See* Comments filed by Ameritech, U.S. West, Pacific Bell, NYNEX and Southwestern Bell (hereinafter referred to collectively as BOCs). *See also* Reply Comments filed by NYNEX.

[31] Ameritech Comments at 6.

[32] Ameritech Comments at 7.

[33] U.S. West Comments at 7.

[34] NYNEX Comments at 3, Pacific Bell Comments at 5, Southwestern Bell Comments at 3.

[35] Southwestern Bell Comments at 4, Pacific Bell Comments at 4.

[36] Ameritech Comments at 7.

[37] US West Comments at 8.

[38] US West Reply Comments at 6.

[39] *Id.*

[40] GTE Comments at 5.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* Comments of Avanti, FAI, Kentrox, Larse, and Larus. *See also* Comments and Reply Comments of Verilink.

[45] Avanti Comments at 1-2, Verilink Comments at 1-2, Larse Comments at 2, Larus Comments at 1.

[46] Verilink Comments at 8-9, FAI Comments at 4.

[47] Verilink Comments at 10.

[48] FAI Comments at 4.

[49] *Id.*

[50] Kentrox states that the Commission should not relax the Part 68 requirement that registered terminal equipment must include LBO functionality. Kentrox Comments at 2. Kentrox argues that while eliminating LBO from NCTE might save less than $20.00 in costs per unit, the impact of its removal may in the near term prove burdensome as customers who replace existing equipment will not necessarily be aware of its absence and the need to have older circuits outfitted with jacks having LBO functionality. *Id.* at 4.

[51] AT&T Comments at 6.

they support the standard. [52] U.S. Sprint believes the standard itself places the LBO on the network side of the interface. [53]

15. The petition is opposed by IDCMA, an association of certain manufacturers of modems, digital data sets, multiplexers, network management systems and other devices used in data communications. IDCMA rejects network LBO as a method of implementing the ANSI standard. [54] It notes that ANSI has indicated that it has no responsibility to consider legal or policy matters and argues that the ANSI standard should have no bearing on the Commission's ruling on the Petition. [55] IDCMA also argues that BellSouth and its supporters have failed to identify or cite evidence of any true problems caused by the present system of joint engineering to warrant migrating LBO to the network side of the demarcation point. [56] IDCMA objects to the ANSI Standard generally; it argues that, under the standard, the signal to be presented at the network interface is narrowly constrained, and, depending on the cable gauge and type, the user might be allowed only about 300 feet on the customer side of the network interface before either regenerators or preemphasis circuitry would be required. [57] IDCMA argues that the additional equipment needed under the standard unnecessarily raises costs, the potential for added electrical magnetic interference and crosstalk. [58] IDCMA urges that a declaratory ruling cannot issue because it is plain that Part 68 requires equipment LBO and not network LBO. IDCMA also urges that a waiver should not be granted where network equipment would interfere with NCTE functionality. [59] IDCMA believes that placing the LBO in the transmit path renders the NCTE LBO useless. [60] It opposes the Petition and rejects the ANSI standard.

16. NATA, an association of CPE vendors and installers, also opposes the Petition. NATA argues that a declaratory ruling cannot issue because there is no basis for "reading into" the loopback test exception any authority to provide additional non-testing functions. [61] NATA further argues that BellSouth has failed to meet the burden of proof required for grant of a waiver. [62] NATA states that a waiver is warranted only if there is a completely detailed and well documented showing that a regulated offering will increase the efficiency of a service in a manner that cannot be attained by providing the function in unregulated CPE. [63] NATA argues that BellSouth has not made this showing. It also states that the primary efficiency cited by BellSouth, the elimination of joint engineering, is nothing more than the carrier telling the customer the correct LBO setting. [64] NATA states that any benefit gained by the elimination of joint engineering would be outweighed by the additional burdens and increased risk to the customer. [65]

17. Late-filed comments were received from the Independent T-1 Users Association (ITUA) and the Committee of Corporate Telecommunications Users (CCTU), both of which are not-for-profit organizations representing DS 1 users.[66] CCTU opposes the petition, stating that implementation of the BellSouth proposal would require increases in the signal power traversing inside wiring in almost all cases. [67] It argues that this in turn would significantly increase the probability of disruptive inductive crosstalk, "as well as the likelihood of using adjacent inside wiring conductors for other applications, since this wiring is not typically shielded." [68] CCTU reasons that users would be required to install duplicate inside wiring and, in the financial services sector, incur costs for shielding or other security measures directed at limiting emitted interference. [69] ITUA echoed this view, adding that in many installations additional customer provided regeneration equipment will be required as well as a possible change-out of existing CPE (to power these regenerative regenerators) due to the severe limitations imposed upon the distance between the CSU and the network interface under the, ANSI standard. [70] However, in a written *ex parte* presentation filed December 12, 1989, ITUA revised its position stating that,

> Since our original letter of July 10, 1989, we have had opportunity to more fully explore the associated issues, and are now satisfied that what BellSouth is seeking permission to do does not conflict with our interests. ... Our previously expressed concern for increased risk of interference in premises wiring was based on apparent misinformation. We understand that BellSouth's implementation of DS 1 service is in accordance with a new ANSI Standard, T1.403, and that such implementations appear to preclude the possibility of such interference. Although this standard requires CPE to always source pulses which approach the maximum allowed by your Part 68 Registration Rules, it is the difference between the level of source pulses and of those received from the network or other sources which creates the possibility of interference. The standard requires this difference to be limited to a figure (18 dB) which, we understand, is sufficient to allow basically unrestricted assignment of DS 1 services in existing premises wiring.

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[52] U.S. Sprint filed a letter in support of the petition on March 14, 1989. No party has objected to the filing of this letter. It shall be treated as an informal comment and made a part of the record.

[53] *Id.*

[54] IDCMA Comments at 4.

[55] *Id.* at 5.

[56] *Id.* at 7.

[57] *Id.* at 10.

[58] *Id.*

[59] *Id.* at 9.

[60] *Id.*

[61] NATA Comments at 3.

[62] *Id.*

[63] NATA Reply Comments at 4 (citing *Computer III Phase II Reconsideration*, 3 FCC Rcd. at 1167, para. 129, note 247).

[64] NATA Reply Comments at 5. By contrast, USTA states that initial deployment of DS 1 service requires close coordination between carrier engineers and the CPE provider. USTA Comments at 4. It urges that problems with excessive signal power and other network problems are real ones, documented in the comments. USTA Reply Comments at 2.

[65] NATA Reply Comments at 5.

[66] These filings will be viewed as informal comments. *See* 47 C.F.R. Section 1.419.

[67] CCTU Informal Comment at 2.

[68] *Id.*

[69] *Id.*

[70] ITUA Informal Comment at 1.

18. ITUA also withdrew its assertion that the BellSouth Petition would require customers to install additional regenerators. ITUA states that:

> ITUA understands that the BellSouth telephone companies always place the network interface close (within 200 feet) to where their customers request it. This is within the passive range (250 to 400 feet) accommodated by the above mentioned standard [ANSI standard]. Under such conditions, extra regenerators are not needed. [71]

ITUA then further clarified its position in an *ex parte* letter filed February 22, 1990 stating that ITUA has not reversed its original position but instead has revised it to ensure that the network interface be placed close (within 200 feet) to the user's multiplex equipment to eliminate the risk of interference in premises wiring. [72] If such a placement restriction is made mandatory, ITUA states that it would support BellSouth's petition. [73]

19. In an *ex parte* letter filed December 18, 1989, IDCMA responded to ITUA's revised position. IDCMA counters that there is nothing in the public record which binds BellSouth, much less the other local exchange carriers, to locate the network demarcation within 200 feet of the customer's CPE. [74] By written *ex parte* communication filed January 26, 1990, BellSouth states that 200 foot spacing mentioned by both ITUA and IDCMA is consistent with BellSouth's current policy of installing service close to where the user requests it. BellSouth notes that in the particular case of DS1 service, that distance is consistent with the physical limitation recently imposed by the ANSI standard. BellSouth states that while alternative approaches may be more appropriate for other carriers, BellSouth would not object to the Commission's consideration of a specific 200 foot requirement if deemed a necessary condition for granting BellSouth's requested relief.

20. On January 18, 1990 an *ex parte* letter opposing the BellSouth petition was filed by the International Communications Association (ICA). ICA states it is the largest and most broadly based organization of telecommunications end users in the United States. [75] ICA states that its members -- more than 700 major corporate, educational, and governmental users of telecommunications equipment, facilities, and services -- spend, in the aggregate, approximately $18 billion per year on telecommunications equipment, facilities and services. [76] ICA argues that:

> BellSouth has not shown that the implementation of the LBO functionality on the carrier side of the Network Interface (NI) is necessary to permit adequate testing. Opponents of BellSouth's petition have demonstrated that any necessary testing can be readily accomplished without implementing LBO in a "smart jack" on the carrier side of the NI, as BellSouth proposes. [77]

ICA further argues that the effect of granting the relief requested by BellSouth would be: higher rates and charges, reduced flexibility, and increased electromagnetic interference. [78] ICA urges that the flexibility presently enjoyed by DS-1 customers in locating CSUs within several hundred feet of the NI would be greatly reduced if LBO is provided on the carrier side of the NI. [79] ICA believes that the introduction of high signal power levels into premises wiring is required to implement carrier-side LBO and this would increase the potential for crosstalk and for electromagnetic interference in the vicinity of 772 kHz. [80]

21. In an *ex parte* letter filed February 22, 1990, Verilink states that carrier provision of LBO in DS 1 transmissions will permit manufacturers and carriers to simplify installation procedures and eliminate customer confusion in installing T1 circuits. [81] As a result, it adds, a grant of the requested declaration would likely eliminate a source of network harm, significantly reduce customer service costs for CPE manufacturers and greatly facilitate the provisioning of T1 circuits. Verilink also explains that the T1 Committee members discussed at length the economic and technical superiority of the DS 1 metallic interface. Verilink states that the T1 Committee, including several CSU manufacturers, concluded that the proposed standard which incorporates provision of LBO by the serving carrier would not require that existing CPE be retrofitted or replaced, render existing CPE obsolete or harm the CPE manufacturing industry. [82]

22. The Utilities Telecommunications Council (UTC), representing the telecommunications interests of the nation's electric, gas, water and steam utilities, filed an *ex parte* written statement in opposition to the Petition on September 8, 1989. UTC states that carrier provision of LBO would increase the user's cost for DS 1 service and undermine the Commission's pro-competitive CPE policies.

23. ANSI does not take any position with respect to BellSouth's Petition. It states that the standard is an interface standard, and that it is silent on the location of the LBO. [83] ANSI explains that for the Committee to judge regulatory, policy or legal issues would involve it in areas it never considered to be within its jurisdiction and would require of it areas of expertise that do not reside within the Committee. [84]

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71 ITUA *ex parte* letter filed December 12, 1989 at 2.
72 ITUA *ex parte* letter filed February 20, 1990.
73 *Id.*
74 Currently, the location of the network interface is governed by carriers' reasonable and nondiscriminatory standard operating practices.
75 ICA *ex parte* letter dated January 18, 1990 at 1.
76 *Id.*
77 *Id.*
78 *Id.* at 2.
79 *Id.*
80 *Id.*
81 Verlink *ex parte* letter dated February 22, 1990.
82 *Id.* at 2.
83 ANSI Reply Comment at 10.
84 *Id.* at 11.

IV. DISCUSSION

24. Before the unbundling and detariffing of NCTE, when telephone companies provided both the terminal equipment and the associated transmission service on a regulated basis, the signal attenuation function was performed by the local telephone company. With the declaration of NCTE as CPE, and concomitant unbundling, there was still a need to avoid crosstalk caused by increased signal levels, a "harm" to the network as defined by 47 C.F.R. Section 68.3(g). In that signal level functionality was already part of NCTE, the Commission concluded that LBO should remain a CPE feature and the telephone company should instruct the NCTE installer on the appropriate signal level option prior to service commencement. [85] The Commission found no compelling need to migrate LBO to the network. It therefore required that all registered NCTE equipment continue to provide the attenuation function previously provided by network NCTE. [86] LBO became an adjunct equipment function which CPE manufacturers were required to offer to customers.

25. In reexamining its treatment of NCTE in *Computer III*[87] the Commission sought comment on whether "signal conditioning" was an NCTE function which should migrate to the network side of the demarcation point. [88] The Commission decided that only loopback testing would migrate to the network. In the absence of a standard network interface, DS 1 service continued to require joint engineering between customer and telephone company for installation and commencement of service. With this background, we turn to the Petition before us to decide the extent to which the BellSouth Petition satisfies the established tests for granting a declaratory ruling or waiver. We will discuss each standard as applicable to the facts presented in the record.

26. *Declaratory Ruling.* The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on a party's motion or on its own motion, issue a declaratory ruling terminating a controversy or removing uncertainty. [89] In *Interconnection Order II*, the Commission noted that the telephone companies had identified a legitimate area of potential network harm if CPE is permitted to introduce excessive signal power into the network. [90] While deciding to create the three setting options for LBO on NCTE, the Commission noted that:

> The BOCs have proposed rules that will ensure that registered terminal equipment for connection to digital terminal equipment will not exceed acceptable signal power limitations. These rules will be sufficient to protect against the possibility of excessive signal voltages without imposing additional administrative requirements on consumers. [91]

Later, in the *Computer III NPRM*, and again in the *Supplemental Notice*, the Commission specifically discussed signal level processing among the NCTE functionalities which technically could migrate to the network. [92] In comments and reply comments in that proceeding, BellSouth took the position that all functions proposed in the rulemaking, including signal conditioning, should migrate to the network. [93] In the *Computer III Phase II Order*, the Commission stated that "while additional NCTE functions were proposed by various parties as appropriate for carrier provision on a regulated basis, the case for each is less convincing than that for remote loopback testing." [94] Whether termed signal conditioning, signal level processing or line build out, there should be no uncertainty that only loopback testing was chosen, and only under limited circumstances, as meriting an exception from the general treatment of NCTE as CPE.[95] The Commission made clear its intention to define exceptions to CPE treatment of NCTE functionalities under "carefully delimited conditions to prevent carriers from encroaching on the flourishing competitive market for CPE.[96]

Accordingly, we agree with NATA that there is no basis for "reading into" the loopback test exception any authority to provide an additional non-testing function such as LBO. We see no uncertainty where the Commission has clearly previously considered and rejected a specific proposal advocated by the same Petitioner. BellSouth further supports its request for declaratory ruling by seeking an interpretation that LBO falls within the scope of jacks and connectors which it states are exempt from registration under Part 68 of the rules. However, BellSouth fails to identify any policy or Section of Part 68 of the rules which would support this interpretation. Subpart F of Part 68 of the rules describes the specifications of jacks and connectors approved for use by carriers; LBO is not included in any of these specifications. [97] Indeed, Part 68 expressly includes LBO as a function of CPE. [98] Absent a showing that a genuine controversy or uncertainty re-

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[85] *See Interconnection Order II*, 49 Fed. Reg. at 48715, paras. 4-7.

[86] *Id.* at 48720.

[87] *See Computer III NPRM*, 50 F.R. at 33604 para. 152(d).*See also Supplemental Notice*, 60 R.R. 2d at 710-11.

[88] Signal conditioning and signal level processing are earlier terms for LBO.

[89] *See* 5 U.S.C. § 554. *See also* 47 C.F.R. § 1.2.

[90] *Interconnection Order II*, 49 Fed. Reg. at 48715.

[91] *Id.* at 48716.

[92] *See supra* para. 7.

[93] *See Computer III Phase II*, BellSouth Comments at 36, and Reply Comments at 13: "... the Comments overwhelmingly support carrier inclusion of certain NCTE functions (specifically circuit termination, loop back testing, and signal conditioning) in their networks."

[94] 2 FCC Rcd. at 3105. *See also supra* para. 7.

[95] Ameritech states that the Commission's orders dealing with the prohibition against regulated provision of NCTE functionality never dealt with the provision of LBO functionality under circumstances in which an industry standard has rendered its provision by CPE unnecessary and inappropriate. Ameritech Comments at 6 (citing *Interconnection Order* and Memorandum Opinion and Order, FCC 84-145 (released April 27, 1984)). We find that this assertion does not alter the standards under which a declaratory ruling request must be considered.

[96] *See Computer III Phase II Reconsideration*, 3 FCC Rcd. at 1167, para. 140.

[97] *See* 47 C.F.R. § 68.500.

[98] *See* 47 C.F.R. § 68.308(h)(2)(ii).

quires clarification, we find that a declaratory ruling is not the proper vehicle for the relief sought by Petitioner. We now turn to the alternative relief under consideration.

27. *Waiver.* The original CPE-NCTE waiver standard was articulated in *Interconnection Order I* and required only that the carrier demonstrate that "exigencies exist which have not been demonstrated to be applicable to the CSU devices." [99]

The Commission listed as examples of possible waiver scenarios:

> where there is a wide variability among loop characteristics, where the characteristics of each loop are unstable, or where facilities are changed frequently or are unstable, or where facilities are subject to extraordinary interference. [100]

Later, in *Computer III Phase II*, the Commission redefined the waiver criteria for network provision of NCTE functionalities. Under these criteria, a waiver will be considered if the carrier demonstrates that the offering of the particular functions as a part of network service will serve the public interest by increasing the efficiency, or making technically possible the delivery, of a particular service, and that provision of those functions through unregulated CPE will not permit attainment of comparable efficiencies or service offerings. [101] The Commission stated that the new waiver standard replaced the waiver standard in the *Interconnection Order*. [102]

28. The impact of a new ANSI interface standard, which is the impetus for the subject Petition, is a matter that may have broad impact on the telecommunications industry, including carriers, manufacturers and users. We believe it is reasonable to assume that if the Commission were to grant BellSouth its requested waiver, numerous other carriers would file similar waiver requests. A blanket grant of such requests, however, may affect the viability of Part 68 of the rules, which requires that all registered NCTE be capable of performing LBO functionality. [103] While we believe the issue of revising Part 68 to reflect an alternative interface standard may constitute a matter worthy of consideration, the proper vehicle for such consideration is a rulemaking proceeding. Rulemaking serves as the regulatory process by which changes of broad applicability in Commission policy or regulations may be adopted. [104]

29. *Rulemaking.* The record in this proceeding supports the notion that implementation of the ANSI standard would eliminate the need for joint engineering by instituting a standard metallic interface for DS 1 service. Support for the standard exists among telephone companies, interexchange carriers, and some CPE manufacturers. However, late-filed informal comments by some DS 1 users indicate that concerns exist regarding the potential impact of the standard on customer cabling runs and the need for additional equipment. Moreover, questions of implementation remain unresolved and require further analysis. If supporters of the ANSI standard wish to initiate a rulemaking proceeding, however, we need an adequate analysis of the efficiencies to be gained by the application of the ANSI DS 1 metallic interface standard and the consequences to DS 1 users.

30. The record in this proceeding demonstrates that, even among commenters who support the ANSI standard, no clear concensus exists as to whether: (1) the telephone network should be required to provide LBO; (2) the network should be permitted optionally to provide LBO; (3) registered equipment should continue to be required to provide LBO; or (4) registered equipment should be precluded from providing LBO. The BOCs argue that LBO at the network interface is the most efficient and cost effective method of implementing the ANSI standard. [105] US West argues that any efficiencies gained by the standard are lost if LBO is required both in the network loopback and in the NCTE. [106] GTE goes one step further and proposes that LBO should be a mandatory component of the network interface jack and an optional feature of NCTE. [107] Those manufacturers that support the BellSouth Petition insist that CPE functionalities should not generally migrate to the network; they request that they continue to be allowed to provide LBO. [108] We observe that the ANSI standard establishes a fixed signal level of 12.0 to 19.0 dBm at the interface. Depending on the distance between the interface and the first network regenerator, LBO will be required in order to protect the network. Much opposition has been voiced among user associations to both the ANSI standard and to network provision of LBO. To the extent that network LBO may be needed to attenuate strong signal levels from the CPE to the network, it is not clear why the ANSI standard has established an NCTE signal level to the interface of 12.0 to 19.0 dBm. We therefore ask that if parties file for a rulemaking proceeding, they should provide focused, detailed analyses of the issues raised by the ANSI standard, and their proposals should address the following concerns:

> 1. What savings will result from elimination of joint engineering? What is the annual dollar amount of these savings? How are amounts calculated? Who benefits from each indicated saving?

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[99] *Interconnection Order I*, 94 FCC 2d at 20, paras. 39-41.

[100] *Id.* at 20, para. 40.

[101] *Computer III Phase II Order*, 2 FCC Rcd. at 3105, para. 234. *See also* paras. 6-7 *supra*.

[102] *Id.* at 3120, n. 539. The waiver standard adopted in *Computer III Phase II* standard is more stringent than the standard previously enunciated and requires a more detailed showing by the carrier. However, the Commission also stated in *Computer III Phase II* that the circumstances that potentially would support the grant of a waiver would include, but not be limited to, those recognized previously in *Interconnection Order I*.

[103] *See supra* paras. 2-5. BellSouth essentially asks this Commission to alter the current standards embodied in Section 68.308 of the rules. The provision of remote loopback testing through network equipment placed on customer premises did not similarly affect our Part 68 rules.

[104] *See* 5 U.S.C. § 553; 47 C.F.R. § 1.415.

[105] *See supra*, para. 8.

[106] US West Comments at 8.

[107] *See supra*, para. 12.

[108] *See* Larse Comments at 2: "We also strongly believe that other, additional CSU functions, such as regeneration, keep alive, network protection, and pulse density should not be permitted to be provided by a carrier as part of its regulated network service."

2. What impact does the ANSI DS 1 interface standard have on Part 68 or on current interconnection practices under Part 68? What should the relationship be between the ANSI DS 1 interface standard and Part 68? What rule changes may be necessary to accommodate the ANSI DS 1 interface standard? Should current LBO functionality requirements in Part 68 be eliminated? If LBO were eliminated, how would the transition be accomplished through Part 68, including any proposed rule changes?

3. What would be the cost to CPE users of (1) requiring network provision of LBO or (2) permitting network provision of LBO? Include dollar amounts and method of calculation. How would either (1) or (2) affect tariffed rates for DS 1 service, initially and subsequently?

4. Provide statistical information regarding the average cable length from the CPE to the interface, including data regarding the current average signal level at the network interface.

5. What effect, if any, would mandatory or permissive network provision of LBO at the interface have on competition in the CPE market, and what impact would such provision have on DS 1 services? Include quantitative support.

6. Explain how the specific signal levels proposed by the ANSI standard were arrived at, especially the 12.0 to 19.0 dBm level for NCTE signals at the interface. Are the ANSI minimum signal strength levels higher than current signal strengths to the network interface? If so, why? If not, why not?

7. What has occurred in the marketplace or in the regulatory environment to justify any changes in current Commission policies favoring retention of LBO in CPE? Explain the relationship between these marketplace or regulatory occurrences and the need to change Commission policy.

8. Should DS 1 services be treated differently from other digital or analog services under Part 68?

V. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, that the Petition for Declaratory Ruling and Alternative Request for Waiver filed by BellSouth IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT GENERAL CORPORATION	File No. 62-DSS-AL-90
Application for Consent to Assignment of the SBS-3 Domestic Fixed Satellite Radio Station Construction Permit and License	
and	
Application for Modification of the SBS-3 Domestic Fixed Satellite Space Station Construction Permit, License and Other Authorizations	File No. 63-DSS-MP-90

ORDER

Adopted: May 29, 1991; Released: June 5, 1991

By the Chief, Domestic Facilities Division:

1. MCI Telecommunications Corporation (MCI) and COMSAT General Corporation (COMSAT General) have requested authority to assign all the authorizations for the SBS-3 satellite to COMSAT General and to modify SBS-3's license to enable COMSAT General to operate SBS-3 at 95^0 W. L. through the end of its 1992 license term using the "COMSAT Maneuver." No comments or oppositions have been filed. For the reasons discussed below, the applications are granted.

BACKGROUND

2. COMSAT General executed an Agreement on October 10, 1986 with Satellite Business Systems (SBS) and MCI. This agreement provided that MCI will transfer its ownership of its SBS-1, 2 and 3 satellites to COMSAT General over the next several years. Applications to assign the licenses for SBS-1 and 2 were filed in 1987 and were subsequently granted. [1]

3. The parties now propose to assign the licenses for SBS-3. COMSAT General proposes to operate the SBS-3 satellite at its assigned location of 95^0 W.L. for the remainder of its license term. [2] COMSAT General states that it will offer a wide range of transmission services which will enable a variety of users to select combinations of services tailored to their individual requirements.

4. Upon consummation of the assignment, COMSAT General proposes to begin operating the SBS-3 satellite using the COMSAT Maneuver, [3] extending the lifetime of the satellite. COMSAT General states that it has operated its SBS-1, SBS-2 and COMSTAR D2/D4 satellites using the COMSAT Maneuver for a number of years with no adjacent satellite interference in either the space or ground segment with satellites at two degrees apart. [4]

DISCUSSION

5. The Commission has a statutory obligation to determine whether granting an application to transfer or to assign an authorization will serve the public interest, convenience and necessity. 47 U.S.C. § 310(d). COMSAT General, a wholly-owned subsidiary of Communications Satellite Corporation (COMSAT), holds various domestic, international and maritime radio licenses and authorizations. Its technical qualifications to operate these facilities are a matter of record with the Commission. Therefore, we find that, pursuant to 47 U.S.C. § 308, COMSAT General is legally, technically, financially and otherwise qualified to be a licensee in the Domestic Fixed-Satellite Service.

6. We will permit COMSAT General to operate SBS-3 using a modified north-south orbit inclination, also known as the "COMSAT Maneuver," of up to five degrees, thus extending the operational life of the satellite. Grant of this application will provide an opportunity for the public to continue receiving services from SBS-3. Therefore, we find that, pursuant to 47 U.S.C. § 309, grant of these applications will serve the public interest, convenience and necessity.

ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, Application File No. 62-DSS-AL-90 IS GRANTED and MCI Telecommunications Corporation IS AUTHORIZED to assign the authorizations for the SBS-3 satellite to COMSAT General Corporation. All existing terms and conditions applicable to this authorization shall remain in full force and effect, except as modified by this or any subsequent order.

8. IT IS FURTHER ORDERED that Application File No. 63-DSS-ML-90 IS GRANTED and COMSAT General Corporation IS AUTHORIZED to operate the SBS-3 satellite using the COMSAT Maneuver with an inclination excursion of up to five degrees.

9. IT IS FURTHER ORDERED that authority to operate the SBS-3 satellite with an inclination excursion of up to five degrees is subject to the following conditions:

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[1] Comsat General Corporation, 2 FCC Rcd 4570 (1987).

[2] COMSAT General indicates that after the license expires, it plans to continue to operate the satellite pursuant to a special temporary authority until the Commission assigns another satellite to this location. We are considering here only COMSAT General's request to operate SBS-3 until its license expires in 1992. Any further grant of operating authority beyond that time will be considered when circumstances warrant and an application is filed requesting this authority.

[3] *See* COMSAT General Corporation, 4 FCC Rcd 3820 (1989) at para. 3, for a technical discussion of the COMSAT Maneuver.

[4] *See* Application of COMSAT General Corporation at n. 6.

(a) COMSAT General Corporation shall periodically correct the satellite attitude to achieve a stationary spacecraft antenna pattern on the surface of the Earth and centered on the satellite's designated service area.

(b) COMSAT General Corporation shall control all interference to adjacent satellites, as a result of using the COMSAT Maneuver, to levels not to exceed that which would be caused by the satellite network operating without the COMSAT Maneuver.

(c) COMSAT General Corporation can not claim protection in excess of the protection that would be received by the satellite network operating without the COMSAT Maneuver.

(d) COMSAT General Corporation shall maintain the coordination agreement of those terrestrial stations affected as a result of using the COMSAT Maneuver.

(e) COMSAT General Corporation shall continue to maintain the space station at the authorized longitude orbital location in the geostationary satellite arc with the appropriate east-west stationkeeping tolerance.

10. COMSAT General Corporation is afforded thirty days from the date of release of this order to decline the authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-478

In re Applications of

BEE BROADCASTING ASSOCIATES, A LIMITED PARTNERSHIP — File No. BLCT-870908KG

For License to Cover Construction Permit of Station KCTZ(TV), Bozeman, Montana

BEE BROADCASTING ASSOCIATES, A LIMITED PARTNERSHIP
(Assignor)

And

BIG HORN COMMUNICATIONS, INC.
(Assignee) — File No. BAPCT-871029KH

For Assignment of Construction Permit, Channel 7, Bozemar, Montana

Appearances

Lawrence Bernstein, Esq. and *F. Joseph Brinig*, Esq. on behalf of Big Horn Communications, Inc.; and *Charles E. Dziedzic*, Esq. and *Norman Goldstein*, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: May 29, 1991; Released: June 5, 1991

PRELIMINARY STATEMENT

1. Under consideration are Motion for Summary Decision, filed April 22, 1991, by Big Horn Communications, Inc. ("BHC") and Comments in Support of Motion for Summary Decision, filed May 6, 1991, by the Mass Media Bureau ("Bureau").

2. BHC seeks favorable summary decision on the issues specified against it. It is alleged, and the Bureau agrees, that no genuine issue of material fact remains for determination at hearing and the grant of the captioned applications serves the public interest, convenience and necessity.

3. The issues as presently constituted are as follows:

(a) To determine whether Bee Broadcasting Associates, a Limited Partnership ("BBA") has undergone an unauthorized transfer of control;

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether BBA or Bee possess the requisite qualifications to become a licensee of Station KCTZ(TV); and

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, and pursuant to Section 309(e) of the Communications Act, whether the grant of the captioned applications will serve the public interest, convenience, and necessity.

4. This case was designated by *Hearing Designation Order* ("*HDO*") and *Notice of Apparent Liability*, 55 *Fed. Reg.* 47917, published November 16, 1990. The *HDO* granted in part an August 15, 1988 application for Review, filed by Karen L. Reier ("Reier"), of a *Memorandum Opinion and Order* ("*MO&O*"), 3 FCC Rcd 4323 (M.M. Bur., July 15, 1988) rejecting Reier's Petition to Deny the BBA license application and the BBA/BHC application to assign the KCTZ(TV) construction permit.

5. The *MO&O* found, *inter alia*, that there was no properly substantiated evidence that Benny Bee ever surrendered control of KCTZ; that Thom Curtis never directly or indirectly controlled the basic operating policies at KCTZ; that there was no basis for concluding that BHC's loan to BBA or its agreement to acquire BBA were anything but *bona fide* arm's-length transactions; that a contrary conclusion is not warranted merely because a construction loan is made by a prospective purchaser; that there was no evidence to support the charge that the relationships between BBA and BHC were other than as openly disclosed to the Commission in timely filings; that no evidence was presented to show that Thom Curtis' involvement in KCTZ construction was anything more than that of an experienced broadcaster providing assistance and advice; that BBA did not violate Section 310(d) of the Communications Act or misrepresent its progress toward station construction; that Mr. Curtis' activities are entirely consistent with the day-to-day responsibilities of a station manager acting in furtherance of the basic policies established by the permittee or licensee; that no evidence was presented that Mr. Bee abandoned control of the station; and that there were no misrepresentations or lack of candor with respect to the parties' submissions to the Commission.

6. In partially granting review, the *HDO* made the following pertinent rulings: it summarily affirmed the *MO& O* with respect to all allegations of deception, concluding that Reier raised no substantial and material questions of fact concerning misrepresentations or lack of candor by either BHC, BBA or any individuals; it nevertheless rescinded the grant of the KCTZ assignment application and designated it for hearing; it noted an apparent liability for forfeiture for possible violations of Section 310(d) of the Communications Act and Section 73.1015 of the Commission's Rules; and it made Karen L. Reier a party respondent and assigned her the burden of introduction of evidence on issues (a) and (b).

7. BHC filed a Notice of Appearance on November 21, 1990. BBA noted its appearance on November 27. Reier's Notice of Appearance was filed on November 26; then withdrawn on December 17.

8. A prehearing conference was held on January 10, 1991, attended by counsel for the Bureau and BHC. At that time the possibility of resolving this proceeding by means of summary decision was broached with the Presiding Judge. It was agreed that such a resolution merited further exploration, that efforts to resolve the case by means other than a hearing might appropriately be attempted.

9. Pursuant to an agreement among counsel, an exhaustive search was made of the files of Station KCTZ and all pertinent records were turned over to the Bureau. Additionally, all potentially relevant documents in the possession of BHC counsel were voluntarily provided to the Bureau. No document production motions were required. The deposition of Thomas A. Curtis was taken in Washington, D.C. on February 14, 1991; the deposition of Benny Bee was taken in Washington on March 21. Both were brought to Washington for deposition at BHC's expense. Additionally, at the Bureau's request and to determine the amount of money advanced by BHC to BBA for KCTZ construction and operation, Thomas Hendrickson, now President of BHC, provided a sworn Declaration on February 28, 1991. These materials, plus a number of documents mutually considered to be relevant by Bureau counsel and BHC counsel, form the record of the case for purposes of motion for summary decision.

FINDINGS OF FACT

10. BBA is a limited partnership. Its general partner and 100% owner is Rose Communications, Inc. ("Rose") (Bee Tr. 13). The major shareholder of Rose has been Benny Bee (*MO&O*, para. 2; Ex. 31 (Bee Declaration), *passim*; Bee Tr. 11, Curtis Tr. 2).

11. Benny Bee is a broadcaster of many years' experience, both as a station employee and an operator; except for KCTZ, all his experience has been in radio (Bee Tr. 6-9). BBA is presently licensee of Stations KJJR-AM, Whitefish, Montana, and KBBZ-FM, Whitefish, Montana (Bee Tr. 6). He resides in Whitefish (Bee Tr. 5).

12. BHC is licensee of Stations KOUS-TV, Hardin, Montana, KYUS-TV, Miles City, Montana, and Stations KZMQ-AM/FM, Greybull, Wyoming. Additionally, BHC is the licensee of four low power television stations in Montana and Wyoming. *See HDO*, at n. 2; Ex. 19, Assignee Exhibit 2. In early 1987, the President of BHC was Daniel W. ("Dan") Coon; Mr. Coon was a senior member of the Washington, D.C. law firm Jackson & Campbell, P.C. (Ex. 33, p. 1). BHC Vice President and general manager of its stations was Thomas A. Curtis (Ex. 19, Assignee Table I).

13. In early 1987, Benny Bee, the major principal in BBA, found himself with only six months to build his station or lose it due to the expiration of the construction permit. Accordingly, Benny Bee offered Curtis a 49% interest in the general partner of the permittee if he would construct the station. Curtis also proposed to arrange for BHC to provide construction capital through a secured loan in return for an option to acquire the station. Curtis outlined the option proposal to BHC stockholders on March 9, 1987. At the meeting, Curtis emphasized that he would be personally involved in constructing the station and that until and unless the FCC approved a sale, Bee through BBA would retain control (Ex. 28, pp. 4-5). Through correspondence in March and April, 1987, BBA and BHC reached a preliminary "agreement to agree" to the option arrangement (Exhs. 1 and 2). The Commission was timely informed of this "agreement to agree" on May 14, 1987 (Ex. 6). However, although BHC considered that it had a firm bargain to exercise an option at a set price, Bee refused to execute the necessary documents to go forward with the option agreement, and it was never executed. Nevertheless, with the preliminary "agreement to agree," BHC commenced to loan funds to BHC pursuant to security agreements.

14. Even before the preliminary agreement was reached, Bee believed that Curtis was working for him. "He was going to be my [station] manager and he was getting 49% of the station to build it on time. And I looked at him like I would any other employee working for me." (Bee dep., Tr. 44). Curtis told Bee that he had quit BHC and didn't work for them any more. Bee felt that there was no way that they could get the TV station on the air in the remaining four months allowed without Curtis' full attention (*Id.*). Although Curtis resigned as an officer and director of BHC in April, his formal resignation did not become effective until July 1, 1987 (Ex. 8). He became a vice-president of BBA's general partner on April 19, 1987, when the preliminary BHC-BBA agreement was reached (Curtis dep. Tr. 31). He moved to Bozeman and shortly thereafter was followed by his family (Curtis dep., Tr. 103). He received his 49% interest in BBA's general partner in July, 1987 (Ex. 7).

15. In order to meet the FCC deadline, it was essential for KCTZ(TV) to acquire a studio facility. With the assistance of a realtor, Bee, Curtis and J.R. Middleton, sought an appropriate facility.[1] After checking out numerous sites, Bee agreed to lease studio space in a building which Curtis was acquiring, along with BHC president Daniel W. Coon, as an investment property. The rental negotiations between Bee and Curtis with respect to the studio site were at arm's-length and Curtis' acquisition of an interest in the building was a personal investment (Bee dep. Tr. 59; Ex. 4).

16. BHC's station in Hardin, Montana, had recently become an ABC affiliate. In informal discussions with ABC in early 1987, Curtis, while still working on behalf of BHC, inquired about the feasibility of also making the proposed Bozeman station an affiliate, particularly since BHC hoped to acquire it in the future. The network refused to commit at that time until after the Bozeman station was built but an offshoot of the discussions was that BHC's station in Hardin, Montana and KCTZ(TV) later entered into programming relationship with each other (Ex. 20).

17. Critical to resolution of the unauthorized transfer of control issue and understanding of Curtis' role, is the fact that Benny Bee was actively involved and in charge throughout the entire construction period. He moved to Bozeman and was in daily personal contact with Curtis (Bee dep., Tr. 69). He was the general manager. He along with a BHC vice-president, signed all checks[2] (Bee dep., Tr. 53). Bee approved the purchase of all equipment; (Ex. 28, p. 9); he determined to use inexpensive 3/4-inch tapes, rejecting the strong recommendation of Curtis to use one-inch tape (Bee dep., Tr. 49); he decided to get a new antenna (Bee dep., Tr. 53-54); he fired the structural engineers who had been contacted initially by Middleton

to inspect the strength of the tower (Bee dep., Tr. 51-52). Also, it was Bee who agreed to enter into an agreement with Western Telecommunications, Inc., a common carrier, to transmit programming from BHC's Hardin station KOUS(TV) to KCTZ(TV). Additionally, in March, and April 1987, it was Bee who agreed to have Middleton prepare and file applications with the Commission for the inter-city relay system from KOUS(TV) to KCTZ(TV) and Studio Transmitter and Transmitter Studio Links as quickly as possible. It was Bee who signed the STL-TSL applications, although Curtis, who at the time was still an officer of BHC, signed the inter-city relay system application on behalf of BHC (Exhs. 9 and 10). In sum, Bee was clearly in control in a very "hands on" way with Curtis responsible to him.

18. In order to acquire equipment for the station, Curtis and Middleton attended the NAB convention where they initiated negotiations for equipment. Bee, however, had to approve all orders before any payments were made on them (Ex. 28, p. 9).

19. While progress was being made in construction, advances were being made in the acquisition of programming. In addition to negotiating a deal with BHC in July 1987, to obtain programming for $2,000 a month, Bee personally met with and negotiated an affiliation agreement with ABC in August 1987 (Ex. 14). The agreement was predicated upon KCTZ(TV)'s working relationship with BHC's station KOUS(TV). Curtis only learned of the agreement when Bee informed him of it after it was a *fait accompli*. (Curtis dep., Tr. 77).

20. After the construction of the station was completed, the station commenced operations in September, 1987. As the general manager, Bee exercised responsibility for hiring, firing and the supervision of employees. Bee oversaw finances and programming matters (Ex. 25). Curtis was the station manager responsible for day-to-day operations, and the only former BHC employee working for the station. According to Bee, Curtis' role "was doing what I tell him to do." (Bee dep., Tr. 99). Curtis acknowledged that he was Bee's employee (Curtis dep., Tr. 95). Unlike the areas of construction and equipment where Bee relied extensively on Curtis, Bee prided himself on his expertise in personnel matters. Bee hired the first two employees without consultation with Curtis, indeed, the office manager was hired over Curtis' recommended candidate (Curtis dep., Tr. 62; Bee dep., Tr. 90). Bee recalled personally hiring approximately 11 out of 12 employees (Bee dep., Tr. 92). Bee and Curtis had a confrontation regarding the hiring of a black youth as an intern. Bee insisted that the young man be hired and he was (Bee dep., Tr. 92-93). Bee reviewed all resumes and sent personal notes when he returned applications of unsuccessful candidates (Ex. 13). Even beyond the initial hirees, Bee played a "hands on" role. Thus, with respect to a principal indicator of control of the operation of a station, namely hiring and firing, Bee was clearly in charge. *See, Tri-Counties Communications, Inc.*, 31 FCC 2d 83 (1971).

21. Another principal indicator of control over a station is the ability to control that station's programming and operating policies. *See, Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1973). With respect to programming it is well established that "[t]he Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee." *See, WCHS-AM-TV Corp.*, 8 FCC 2d 608, 609 (1967).

22. Bee's programming philosophy clearly permeated the station's operations. According to Bee, "[w]hat I did here was I designed a television station in a small community with a personality like a radio station." (Bee dep., Tr. 87). Bee clearly wanted KCTZ(TV) to be a Bozeman station and focused on extensive public service and local coverage. He and Curtis collided on the issue of local programming and news coverage. Curtis said local news was "too expensive" to do well and, considering the small size of the market, urged going slowly in the amount of local programming. Bee prevailed and station KCTZ(TV) broadcast local news. The station also broadcast local sports, because the station, at Bee's insistence, had obtained the rights to cover Montana State University football and basketball games (Bee dep., Tr. 89).

23. In addition to network and local programming the station broadcast syndicated and religious programming. Bee instructed Curtis to negotiate to obtain programming by trades or by barter because he did not want to pay for programming (Curtis dep., Tr. 83; Bee dep., Tr. 107). Curtis would negotiate for the programming and then discuss it with Bee who would make the final decision and sign the contract (Curtis dep. Tr. 79, 83 and 84). Bee approved format and programming changes during the entire period (Ex. 29, p. 14). Bee also had a contract to obtain programming from BHC. That contract, however, specifically provided that Bee "retain the right to rebroadcast or not rebroadcast any program set to it by BHC." (Ex. 20). Nothing in the agreement gave BHC any control over what programming was to be carried by KCTZ(TV). Based on the record developed, it is apparent that Bee played the dominant role in programming the station, that Curtis was clearly subordinate to him, and that BHC exercised no influence.

24. There is no dispute that all of the start up funds for construction of KCTZ(TV) came from BHC, which anticipated becoming the assignee of the licensed facility. It is well established that one test of control of a corporation is control over finances. *Coral Television Corp.* 29 FCC 2d 266 (Rev. Bd. 1971), citing *WLOX Broadcasting Co. v. FCC*, 104 U.S. App. D.C. 194, 260 F.2d 712 (1958); *Heitmeyer v. FCC*, 60 D.C. App. 180, 95 F.2d 91 (1937). During the construction phase, Bee decided how much to spend on equipment, approved all equipment purchases in advance, signed the lease for the studio property, paid the engineer and determined Curtis' salary (Bee dep., Tr. 73-74; Curtis dep., Tr. 94, 125). On the advice of counsel, BHC and Bee followed the practice that banks used for the advance of construction money, and the checks required two signatures one signature of the lender (BHC, and one from the borrower, BBA/Bee (Bee dep., Tr. 53-54). There were also security agreements underlying the loans which gave BHC a first lien on the property acquired (Curtis dep., Tr. 97; Ex. 1). There is no evidence indicating that, as a result of its loan, BHC exercised any control or influence over the construction and/or operation of KCTZ(TV). Indeed, respective counsel for the parties were consulted and they advised Bee that the transaction would not raise a material question of unauthorized transfer of control In summary, there is simply no evidence in the instant record which would justify concluding that the financial relationship between BBA and BHC resulted in control. *Compare, WWIZ Inc.* 36 FCC 561 *recon. denied* 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir.), *cert. denied*, 382 U.S. 967 (1966).

25. Once the station was operating under Program Test Authority there was no need to have BHC counter-sign checks because payments were smaller, trust had been established, and some of the funds were being obtained through cash flow (Bee dep., Tr. 95-96). The station had payroll and general accounts (Bee dep., Tr. 99-100). Bee had signature authority over both accounts. He gave to Curtis authority to sign only those checks for which Bee had approved payment, and for ministerial expenditures such as payroll or monthly checks. Bee reviewed all checks and considered himself to be a "bean counter," who kept expenses to a minimum (Bee dep., Tr. 94). According to Curtis, the "guiding principle when it came to finances was that Benny was the boss." (Curtis dep., Tr. 124).

CONCLUSIONS OF LAW

26. A party seeking summary decision must show that no genuine issue of material fact remains for determination at the hearing, Rule 1.251(a).

27. In partially reviewing the Bureau's MO&O, the Commission's *HDO* found that there was a substantial and material question of fact about a possible unauthorized transfer of control because of the involvement of Thomas A. Curtis, formerly an officer, director and shareholder of BHC (the Assignee), in BBA, permittee of Station KCTZ(TV) at Bozeman, Montana (the Assignor). *HDO*, at para. 13.

28. However, in the next paragraph, para. 14, the *HDO* affirmed in all respects the *MO&O* "decision and analysis with respect to the issue of misrepresentation and lack of candor." The *HDO* found no substantial and material question of fact concerning the truthfulness and accuracy of representations made to the Commission by BHC, BBA, Thomas Curtis or Benny Bee, President of BBA.

29. Since the Commission has made a reasoned analysis that there was no deliberate deception, *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 8 RR 2d 991, 996 (1966), the principal considerations in deciding the merits of this Motion are, (a) at any time prior to November 16, 1988, when BHC became the operator and permittee of KCTZ(TV), was there a transfer of control for BBA or KCTZ; and (b) assuming, *arguendo*, that an unintentional transfer of control occurred, is there a basis in Commission policy and precedent to deny the captioned applications?

30. Section 310(d) of the Communications Act of 1934, as amended, prohibits the transfer of licenses or permits without prior Commission approval. There is no exact formula by which the Commission determines whether those holding legal title to a broadcast authorization actually "control" it. *HDO*, at para. 12. The recipient of the authorization is required also to exercise *de facto* control and ultimate authority over station performance. *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023, 51 RR 2d 1474, 1476 (Rev. Bd. 1982), citing *Lorain Journal Co. v. FCC*, 351 F.2d 824, 830 (D.C. Cir.), *cert. denied*, 383 U.S. 967 (1966).

31. The Commission has often recognized that there is no exact formula by which "control" of a broadcast authorization can be determined. To ascertain whether a transfer of control has occurred, the Commission traditionally looks beyond the legal title to determine whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. *See, WHDH, Inc.*, 17 FCC 2d 856 (1969) *aff'd sub nom. Greater Boston Television Corp., v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Although, in most instances, the question of control involves an issue of fact that must be resolved by examining the specific circumstances, the Commission nevertheless has established specific guidelines in this area, focusing on control of the station's finances, personnel and programming. While the *sine qua non* of control is the ability of a permittee or licensee to exercise full control over all matters involving construction and operation of the station, the Commission recognizes that certain duties may be delegated to third parties. However, a permittee or licensee may not abdicate to others ultimate responsibility to determine the manner or means of constructing and/or operating the station. *See, Alabama Educational Television Commission*, 33 FCC 2d 495, 508 (1972).

32. Based on the three most important factors in determining who controls a station, namely finances, personnel and programming, it is clear that there was not an unauthorized transfer of control of the permittee of KCTZ(TV). It is also clear that Bee did not abdicate his duty "to determine the manner and means of operating the [station] . . . ." *See, News International, PLC*, 97 FCC 2d 349, 358 (1984).

33. The suggestion in the *HDO* that there was an unauthorized transfer of control is also belied by the fact that Bee refused to execute the option documents. In doing so, he relied on the following clause in the April 14, 1987, letter of the BBA/BHC "agreement to agree":

> We further understand that your Washington counsel are preparing an option agreement, loan agreement and related security and other instruments. BBA looks forward to the early review of same. Except for the advancement of the down payment, BBA and you understand that *neither will be obligated to go forward with the transaction unless and until these documents are executed*. (Emphasis added) (Bee dep., Tr. 39-40; Ex. 2).

34. Although BHC furnished funds pursuant to the "agreement to agree," Bee was not obligated to assign the facility to BHC. In fact, Bee sought out other assignees and considered other options (Bee dep., Tr. 115). The money advanced by BHC was treated by Bee as a loan and security documents were executed with respect to the funds advanced (Bee dep., Tr. 35). Finally, it is clear from the substantially higher price BHC paid to acquire KCTZ(TV) that there had not been a "meeting of the minds" when the original letters were exchanged.

35. It is also significant that the record clearly establishes that other than Curtis, no BHC principal played any significant role in the construction of KCTZ(TV), nor was any attempt made to exercise any influence over the operation of the station. And, as noted, beyond the initial months of March and April 1987 when he set up the initial "agreement to agree" between BHC and BBA and continued to carry out certain residual responsibilities to BHC, Curtis devoted full time to KCTZ(TV) and Bee. Indeed, by April 1987 Curtis had terminated his association with BHC, apart from his minor stock interest, by resigning, effective July 1, 1987, his officer and director positions. Thus, even during the construction period, Curtis was exclusively responsible to Bee with respect to

KCTZ(TV). Indeed, by July 1987, Curtis noted that he no longer had any credibility with BHC (Curtis dep., Tr. 113; Ex. 27).

36. Although disposition of this proceeding by summary decision would preclude the Presiding Judge from observing the demeanor of the witnesses and from making his own credibility findings, it is noted that in this case both Bee and Curtis were subjected to extensive questioning at deposition. The Bureau submits that it is not necessary for the Judge to observe their demeanor. Curtis has no current interest in the outcome of this proceeding since he left the station in August 1989, sold his BHC stock and has had no connection with BHC since December 13, 1989. [3] In fact, he is no longer engaged in the field of broadcasting and has had no recent contact with Bee or the principals of BHC.[4]

ULTIMATE CONCLUSIONS

37. Based upon the record that was developed through depositions and documents production, it is clear that there was no authorized transfer of control of BBA, that the parties possess the qualifications to be licensees/permittees of the Commission and that summary decision is warranted. No useful purpose would be served by conducting a hearing. Accordingly, IT IS ORDERED that the issues specified against BHC ARE RESOLVED in its favor and the captioned assignment of the KCTZ construction permit from BBA to BHC and the captioned application for a license to cover, thereby awarding Big Horn Communications the license of Station KCTZ(TV), Channel 7, Bozeman, Montana, ARE GRANTED, and this proceeding IS TERMINATED.[5]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] Middleton was BHC's director of engineering. However, Middleton was paid by Bee for his services in connection with KCTZ(TV).

[2] BHC had advanced BBA $350,000 for construction costs by June 15, 1987.

[3] His sole related interest of any kind pertains to a pending application to assign to BHC the construction permit for Channel 6 at Billings, Montana, which he and the late Daniel Coon had obtained under the name BHC Associates, Limited Partnership.

[4] It is also noted that the Chief, Video Services Division, Mimeo. No. 12926, released May 3, 1991, in granting a pending application to assign the construction permit for station KPQD, Channel 6, at Billings, Montana to BHC made certain findings directly relevant to this proceeding which lend additional support to the pending motion.

[5] In the event exceptions are not filed within 30 days after the release of this Summary Decision and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-610

In re Application of

RAVEESH K. KUMRA File No. 10019-CL-P-340-A-88

For construction authority to establish
a new cellular system to operate on
Frequency Block A in the Domestic Public
Cellular Radio Telecommunications Service
to serve Market 340, California 5 -
San Luis Obispo Rural Service Area

Appearances

Stephen Kaffee, Esq. and *Thomas C. Power, Esq.*, on behalf of Raveesh K. Kumra; and *Gerald M. Zuckerman, Esq.* on behalf of the Chief, Common Carrier Bureau Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: May 28, 1991; Released: June 5, 1991

PRELIMINARY STATEMENT

1. This is a ruling on a Joint Motion For Summary Decision ("Joint Motion") that was filed on March 15, 1991, by the remaining parties to this proceeding: Raveesh K. Kumra ("Kumra") and the Common Carrier Bureau (the "Bureau").[1] This decision is rendered incident to a stipulated record and a representation by Bureau counsel that relevant evidence developed in discovery will not support a finding of a violation under the federal communications laws.

2. It is noted that while the Joint Motion was under consideration, the Presiding Judge received an uninvited *ex parte* written communication from a non-party, Mr. Om Parkash Kalra. Mr. Kalra reported that he believed that he could provide testimony that would expose Kumra as having an undisclosed 95% interest in an application to which Mirgon had been a party. By *Order* issued April 2, 1991 (FCC 91M-1180), the Presiding Judge instructed the parties that no further action would be taken on the Joint Motion until the Bureau made an investigation into Mr. Kalra's accusations. On April 17, 1991, the Bureau reported in a pleading styled "Common Carrier Bureau's Report Regarding Om Parkash Kalra" that Mr. Kalra's allegations against Kumra, which are now undocumented and uncorroborated, relate to the Salem, Oregon MSA market and not to the Elmira, N.Y. or to the San Luis Obispo, CA markets. Thus, there is no basis for any further delay in this case in order to consider the allegations of Om Parkash Kalra, and the Bureau's recommendation to proceed with the Joint Motion is accepted as the appropriate course of action.

3. The case was designated under *Hearing Designation Order* (DA 89-1643) ("*HDO*"), *In re Application of Raveesh K. Kumra*, 5 F.C.C. Rcd 116 (C.C. Bureau January 8, 1990), published at 55 Fed Reg. 1611 (January 17, 1990). The following issues were set for a hearing:

> 1. To determine all the facts and circumstances surrounding the preparation and filing of the application of Kenneth E. Tubman for the non-wireline cellular license in the Elmira, New York MSA;
>
> 2. To determine the facts and circumstances of any relationship, agreement or understanding between Kenneth E. Tubman, Raveesh K. Kumra and Western Cellular Management, Inc. relating to the Elmira application and authorization;
>
> 3. To determine, on the basis of the evidence adduced, whether Raveesh K. Kumra was the real party in interest behind the Elmira, New York MSA application;
>
> 4. To determine, on the basis of the evidence adduced, whether Raveesh K. Kumra possesses the requisite character qualifications to be a cellular radio licensee of the Commission;
>
> 5. To determine, based upon all the foregoing issues, whether grant of the captioned application filed by Raveesh K. Kumra for the Block A cellular license in the San Luis Obispo, California RSA, would be in the public interest, convenience and necessity.

HDO at Para. 10. Kumra could be denied a Commission license if the sanction is supported by reliable, probative and substantial evidence. 5 U.S.C.A. §556(d). The burden of proof on the issues was assigned to Kumra. *HDO* at Para. 11. After review of the Joint Motion and the supporting documentary and deposition evidence, and for the reasons stated below, it is found that Kumra has met his burden of proof.

4. Findings below are based on documents containing relevant evidence which were a part of a state court record that had been sealed pursuant to a settlement agreement. Subpoenas were issued to the parties to the state court action and compliance was deferred in order to obtain appropriate relief from the state court. *See Order* FCC 90M-1485, released June 5, 1990. The state court unsealed the record for purposes of this case, and production of relevant documents was ordered by this Presiding Judge. *See Order* FCC 90M-1970, released July 9, 1990. Production of documents by Kenneth E. Tubman ("Tubman"), who was asserting a Fifth Amendment privilege, was stayed pending action by the Justice Department on a request for immunity. *See Order* FCC 90M-2128, released July 19, 1990, and *Order* FCC 90M-2336, released August 2, 1990. If Tubman's allegations held up under litigation testimony, Kumra could have been disqualified for a violation of the Act and the Commission's rules [47 C.F.R. §22.13(a)(1)] for a failure to possess the requisite character qualifications to receive a Commission license.

5. A Commission request for use immunity was honored by the United States Attorney General, and Tubman was ordered to produce documents and to testify. *See Order* FCC 90M-3028, released September 25, 1990. Tubman's deposition was taken on November 27, 28 and 29, 1990, and based on representations of the parties on

time needed to prepare for trial, the hearing date was reset for April 2, 1991. *See* Order FCC 90M-3028, released October 2, 1990.

6. In addition to delays incident to procedures for obtaining state sealed records and Tubman's request for immunity from criminal prosecution, discovery was a contested process throughout the pretrial phase of this case. *See e.g. Raveesh K. Kumra*, 5 F.C.C. Rcd 5607 (Review Bd 1990) (ruling on Kumra's appeal of Trial Judge's rulings on privilege claims with respect to 94 documents). Based on a representation by Bureau Counsel that Tubman's evidence would not support adverse findings against Kumra, the further litigation of this case was suspended to permit remaining parties, Kumra and the Bureau, to file jointly for summary decision. *See Order* FCC 91M-500, released February 8, 1991.

7. References to documents submitted with the Joint Motion are designated "JM Exh. _____." References to the transcript of Tubman's deposition testimony are designated "TD at Tr. _____."

FINDINGS OF FACT

8. On July 17, 1989, Kumra was declared the tentative selectee for the non-wireline Block A construction authorization for the California 5, San Luis Obispo, Rural Services Area ("RSA"). Thereafter, allegations were made to the Commission that Kumra had been a real party-in-interest in the application of Kenneth E. Tubman for a non-wireline construction permit in Elmira, New York, which raised substantial questions of fact about Kumra's fitness to receive a Commission license.

9. It became known to the Bureau that Tubman had filed a pleading in a local state court civil action alleging that Tubman had contracted with a company that was owned and controlled by Kumra, relating to Tubman's application in Elmira. *HDO* at Paras. 1-3.

Summary of Allegations Against Kumra

10. There were three contracts between Kumra and Tubman that were the subject of the state lawsuit that was brought against Tubman by Kumra. One contract, which was written, called for Kumra's company to provide Tubman with 20 applications for cellular radio licenses in 20 Metropolitan Statistical Areas (MSA) to be filed by Kumra in Tubman's name, for which Tubman would pay an initial fee of $5,000. A second contract, which was initially oral but subsequently reduced to writing, was a management agreement allegedly entered into after Tubman won the Elmira lottery. A third contract, which was oral, was an alleged sales agreement for Tubman to transfer to Kumra's company 55% of the Elmira interest. Kumra sued on the contracts and Tubman's answer in the state court action included affirmative defenses that the application and management agreements were shams that were intended to serve as a cover-up for Kumra as the real party-in-interest. *HDO* at Paras. 3-6.

Western's Cellular Application Business

11. The evidence offered in support of the Joint Motion shows that Kumra is sole owner and chief executive officer of Western Cellular Services, Inc. ("WCS") and of Western Cellular Management, Inc. ("Western"). Western is a California corporation and WCS is inactive. (JM Exh. 1.) At the time of the events giving rise to this proceeding, WCS prepared and filed applications for cellular radio construction permits for its clients and for clients of Western. (*Id.*) For its part, Western applied for non-wireline cellular radio licenses in various markets beyond MSA number 150, and provided application and consulting services to cellular applicants, permittees and licensees in those markets. (*Id.*)

Tubman's Background and Modus Operandi

12. Tubman has 20 years of experience in providing financial services and in various real estate businesses. (TD at Tr. 171-74.) Tubman had entered into various settlement groups in which Tubman was able to exchange a portion of the ownership of his own applications (always less than 50%) in return for a small interest (always less than 1%) in other applications that were joined in the settlement groups. In that way, Tubman was able to increase his chances of winning at least a small minority interest through multiple applications. (JM Exh. 1 at Paras. 18-19.) Through these settlement groups Tubman won minority interests in 11 Plan A Markets and in 24 Plan B Markets. (JM Exh. 1 at Para. 20.) Tubman is no longer a Commission licensee and he will not apply in the future for a Commission authorization. *See* Para. 35, *infra*.

Tubman and Western

13. Western and Tubman entered into a Cellular License Application Agreement (the "Agreement") which memorialized an oral agreement entered into by Tubman and Western on March 16, 1986. (JM Exhs. 1 and 2; TD at Tr. 525-28.)

14. The Agreement provided that Western would file applications in 20 identified MSA markets, referred to by the parties as "Plan A Markets." In return for those services:

> [T]he Client [Tubman] agrees to pay Western $5,000 for the above-mentioned 20 applications. In addition, [Tubman] will pay Western a bonus of $5,000 for each market where [Tubman] wins any cellular interest as a result of the application filed. [Tubman] has the option of transferring one-half of the Cellular interest to Western in lieu of the bonus payment.

(JM Exh. 2.) The Agreement also provides that Western would file applications in additional markets on behalf of Tubman at no initial cost to Tubman, which were referred to by the parties as "Plan B Markets." These would merit a bonus payment to Kumra of $10,000 each. (JM Exh. 2; TD at Tr. 69-70.) Alternatively, Tubman, at his option, could transfer a 95% interest to Western in lieu of a $10,000 payment, or Tubman could sell any interest that he won in a Plan B Market and remit 95% of the proceeds to Western up to $10,000. (JM Exhs. 1 and 2; TD at Tr. 467-72.)

15. On April 9, 1986, Tubman tendered his check to Kumra in the amount of $5,000 as initial payment for Western preparing and filing for the 20 Plan A Markets. Western proceeded to prepare and file those applications, as well as 93 Plan B applications. All of these applications, both Plan A and Plan B types, were filed with the Commission by May 23, 1986. (JM Exh. 1.)

The Elmira Application

16. On December 15, 1986, Tubman's application was selected first in the lottery for Elmira, New York MSA. (*Public Notice* (No. 1164), released December 19, 1986.) Tubman's Elmira application had been prepared by Western under Plan B. Because Tubman had not joined in a settlement group, he became sole owner of the winning lottery application for Elmira. (JM Exh. 1 at Paras. 21-22.) But Tubman did not pay Western the agreed to bonus fee of $10,000. Although Tubman could have obtained the financing, he believed that such a payment was not part of his obligation under the agreement. (TD at Tr. 132-33, 528-29.)

17. After winning the lottery, Tubman orally retained Western to assist Tubman in prosecuting his Elmira application. Western was to provide services, subject to Tubman's direction and approval, to effect construction, to secure the financing needed to construct and operate the system, and to manage the day-to-day operations of the system once it was operational. Western was to perform these services while minimizing the financial risk for Tubman. (JM Exh. 1 at Paras. 25-27; TD at Tr. 545-46.) On May 26, 1987, Tubman and Western executed a written management agreement (the "Management Agreement") which memorialized the oral agreement regarding the construction and management of the Elmira system. (JM Exh. 5.) The Management Agreement provided that Western was Tubman's agent and that Tubman would have "the ultimate decision making power" as to all issues. (*Id.* at Para. 2.)[2]

Western's Services For Elmira

18. Under the Management Agreement, Western assisted Tubman in obtaining the non-wireline construction permit for the Elmira MSA and a certificate of public convenience from the New York Public Service Commission. Western also assisted Tubman in his efforts to develop plans for the financing and construction of the system and in negotiation with the larger neighboring cellular systems in the Syracuse, New York MSA and the Binghamton, New York MSA regarding arrangements for using their excess switching capacity for the Elmira system. (Joint Exh. No. 1, para 28; *see also* Joint Exhibits Nos. 6 through 11 and 30 hereto.)

Contemplated Sale To Crowley Cellular

19. The Elmira authorization was later assigned by Tubman. *See* Para. 35, *infra*. But Tubman did not initiate the sale. In May, 1987, Tubman was contacted by Crowley Cellular Telecommunications ("Crowley Cellular") with regard to a possible sale of the Elmira authorization. Crowley Cellular offered to purchase the authorization for a price of $12.50 "per pop," i.e., $12.50 per each person residing in the MSA. (TD at Tr. 88.) In July, 1987, Crowley Cellular increased its offer to $18 per pop. Tubman considered the offer and communicated to Kumra his desire to make a counteroffer of $20 per pop. (JM Exh. 12 and TD at Tr. 574-76.) Thus, Kumra knew that Tubman was negotiating a possible sale to Crowley.

20. In August 1987, while Crowley's latest offer was outstanding, Kumra and Tubman traveled together to Elmira. Tubman paid his own expenses. (JM Exh. 1 at Para. 29; TD at Tr. 216, 554.) Tubman and Kumra stayed in Elmira for several days. There they met with the vice president of a bank regarding financing for the construction and operation of the system and they interviewed potential sales agents. Tubman and Kumra also looked at neighborhoods where Tubman, who was then considering relocating to Elmira, might live. (JM Exh. 1 at Para. 29; TD at Tr. 217.)

Post Elmira Grant Conduct

21. Tubman's Elmira application was granted on September 4, 1987. (*See Public Notice* (Report No. CL-87-329), released September 4, 1987.) In October 1987, while attending a cellular radio conference in San Francisco, Tubman met a communications attorney with the law firm of Fisher, Wayland, Cooper and Leader ("Fisher, Wayland"). Tubman retained Fisher, Wayland to represent the Elmira system. (TD at Tr. 120-21; 294; 553.)

22. In late October or early November, 1987, Tubman requested and received a written offer from Crowley Cellular to purchase the Elmira system for $18 per pop, a copy of which was transmitted by Tubman to Kumra. (JM Exh. 13; TD at Tr. 304.) And while that offer was pending, in December, 1987, Tubman and Kumra discussed a possible assignment of the Elmira authorization to Western. Tubman and Kumra discussed several possible payment plans and one approach they considered was the exchange by Tubman of the Elmira authorization for shares of Western's stock. (TD at Tr. 128.) Tubman and Kumra requested and obtained advice from Fisher, Wayland regarding the tax consequences of such an exchange. Another payment option that Tubman and Kumra considered was a cash sale to be paid by Western in installments. (TD at Tr. 332-33.) These negotiations appear to have been at arms' length.

The Dispute Between Kumra and Tubman

23. Kumra relied on a disputed oral agreement that he believed he had reached with Tubman in December, 1987. Kumra claims that after "negotiations," Tubman agreed to sell a 55% interest in Elmira to Western. The Joint Motion refers to a "Sale Agreement" as does Kumra's sworn statement. (*See* Joint Motion at Para. 36 and JM Exh. 1 at Para. 31.) But there is no such document identified in either reference. Although neither the Joint Motion nor the supporting Kumra declaration state that the "Sale Agreement" was an oral agreement, it is concluded by the Presiding Judge from the absence of any document citation that it was a parole agreement, with related documentation.

24. But there is credence given to Kumra's account based on Tubman's subsequent conduct. On January 26, 1988, Tubman and Kumra attended a cellular conference in San Diego. After the conference, Kumra and Tubman prepared a draft FCC Form 490 Application which contemplated the assignment of Elmira's authorization to Western. (JM Exh. 14.)[3] Tubman also executed a declaration dated January 26, 1988, in which he stated the following:

* * *

> It has - - - became clear that as the operator of a single cellular system, I cannot achieve the type of operating efficiencies that are available to licensees of more than one system.

> Therefore, I have entered into an agreement to assign my interest in the Elmira authorization to Cellular One of Elmira, which is wholly owned by Western Cellular Management, Inc. Western Cellular is the majority shareholder of Lake Charles CellTelCo,[4] and by having controlling interests in two systems, Western Cellular can take advantage of operating efficiencies that would be unavailable to me.
>
> As the proposed transaction will enable financial economies to be passed along to the users of cellular service in both Lake Charles and Elmira, I believe that the public interest would be served by this transaction, and respectfully request that the Commission grant consent to the proposed assignment.

(JM Exh. 15.) Yet on the same day that Tubman was purported to have executed this declaration showing an intent to assign Elmira to Western, Tubman also received notification that Crowley Cellular's offer was increased to $25 per pop. (TD at Tr. 130.)

25. Money had been exchanged before January 26, 1988, between an investment firm and Tubman as to which there are differences in the evidence. Kumra caused to be delivered to Tubman a check dated January 15, 1988, payable to Tubman in the amount of $23,148.38. (JM Exh. 16.) The maker of the check is Fulton, Lauroesch & Associates, Inc., a firm that appears to be a securities investment advisor in Bethesda, Maryland. Atop the check is a typed memo of even date on the same firm letterhead reflecting Kumra's name and address as sender, Tubman's name as sendee, the notation of the same dollar amount, and the following notation:

> Payment in full for minority interests in Tusculoosa, Danville, Albany, Wausau, and Alton/Granity City, plus reimbursement for Alton cap call ($172.38.)

(*Id.*) Kumra claimed and continues to assert that this check represented "the first installment on Western's purchase of Tubman's 55% interest in Elmira." (*See* Joint Motion at Para. 41; *see also* Western's Complaint in the state litigation at JM Exh. 17.) But Tubman testified that Kumra did not tell him the purpose for the check and that Tubman understood from reading the above typed notation that the check was for payment of the minority interests in Tusculoosa, Danville, Albany, Wausau and Alton/Granity City. (TD at Tr. 112-114.) Because of the patent ambiguity of the evidence concerning the Fulton, Lauroesch check, it cannot be concluded that Kumra was making a payment in connection with an Elmira assignment to Western or any other transaction concerning the Elmira cellular authorization.

26. Returning to the meeting between Kumra and Tubman on January 26, 1988, Tubman admits that he wanted to borrow $50,000 from Kumra with the Elmira authorization serving as collateral. (TD at Tr. 129.) Tubman wanted $50,000 at that time as a stake "to apply in the upcoming RSA markets." (TD at Tr. 130.) Kumra apparently was having difficulty providing that amount of cash on short notice but he did agree to provide Tubman with "half of it now and half of it later." (*Id.*) But when Tubman and Kumra met on January 26, 1988 in San Diego, Tubman saw Kumra's handwritten notes on a legal pad for some sort of installment sale. (TD at Tr. 130.) Yet there was no meeting of the minds as to a sale price:

> We had had a dispute at that time over the value of the system. I had received that same day an offer from George Crowley for $25 per pop. The offer before was $18 per pop. Ravi [Kumra] was trying to convince me that the system was worth less than $18 per pop.

(*Id.*)

27. It seems from the evidence that Kumra, while being aware that Crowley Cellular was bidding up the price for Elmira, was trying to firm up a sale favorable to Kumra at the range of $18 per pop. For Tubman did testify that on the day that he had met with Kumra in San Diego, January 26, 1988, he had received "an offer from George Crowley for $25 per pop." (TD at Tr. 130.) It appears from this evidence that the only matter of contention between Kumra and Tubman was the price for a sale of the Elmira entitlement. But there is no evidence from these circumstances that Tubman had lost control over his Elmira authorization.

Tubman's Switch to Crowley

28. Later, in early March 1988, Tubman agreed to sell the Elmira authorization to Crowley Cellular for $30 per pop. (TD at Tr. 392.) Tubman did not advise Crowley Cellular of the existence of any agreements or understandings between himself and Kumra which affected the interest that Tubman owned in the Elmira authorization. (TD at Tr. 412-13.) Rather, Tubman accepted Crowley's higher offer and entered into a sale of 100% of the Elmira authorization to Crowley Cellular. (JM Exh. 19.)

29. Coincidentally, in March, 1988, Western exercised its option to obtain the 45% interest in the Elmira authorization as provided for in the Agreement. (JM Exhs. 1, 5 and 20.) But Tubman refused to recognize Western's interest in the Elmira authorization and on May 23, 1988, Tubman directed Western to "cease all efforts and advised that the Elmira project would be handled by Tubman personally." (TD at Tr. 438; JM Exh. 21.)

30. Western complied with Tubman's directive. But on July 8, 1988, Western filed a civil complaint against Tubman in a California superior court. Among other claims, Western sought to enforce the fee provisions of the Agreement (including the $10,000 bonus fee for the Elmira application), the 45% option provision contained in the Agreement (JM Exh. 5 at Para. 5) and the sale agreement. (JM Exhs. 1 and 15.)

31. On August 22, 1988, Tubman filed an answer in the state litigation denying all liability. (JM Exh. 22.) Tubman reviewed the answer before it was filed. (TD at Tr. 163.) Tubman alleged the existence of an "undisclosed oral agreement" between himself and Kumra, which, he asserted, constituted the true agreement between the parties. Tubman alleged that the Agreement (JM Exh. 2) and the Management Agreement (JM Exh. 5) were "shams" and that Kumra was the real party in interest with respect to Tubman's Elmira license application and the authorization that he had received from the Commission. Tubman

asserted that the real, but unwritten, agreement between Kumra and himself violated the Commission's rules and was unlawful and unenforceable. (JM Exh. 22.)

32. On August 23, 1988, Tubman caused to be filed with the Commission an FCC Form 401 Application seeking to expand the size of the service area for his Elmira authorization. (JM Exh. 23.) In that application, taking a position that was inconsistent with his allegation in the state court litigation, Tubman claimed to be the sole owner of the Elmira license. And Tubman had signed the Form 401 on August 15, 1988, a date before filing his inconsistent answer in the state court. (*Id.*)

33. On July 17, 1989, Kumra was named tentative selectee for the non-wireline Block A construction authorization for the California 5 (San Luis Obispo) Rural Services Area (RSA). (*See Public Notice*, Report NO. CL-89-213, released July 17, 1989).

34. In or about June and July 1989, the parties to the California state litigation entered into various settlement agreements resolving their disputes.

35. By *Public Notice*, Report No. CL-90-26, released October 30, 1989, the Commission granted Tubman's application to assign the Elmira authorization to Crowley Cellular. As a condition to the grant, the Commission required that Tubman dismiss all of his applications pending before the FCC, divest all interests in FCC licenses, and not apply for such licenses in the future. (JM Exh. 24.)

36. On December 12, 1989, the parties to the California state litigation consummated the various transactions contemplated by their settlement agreements and entered into mutual releases with each other. They also entered into agreements under which they sought and obtained an order of the court sealing the record of the California state litigation from the public.

CONCLUSIONS OF LAW

37. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations of denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As Joint Movants, all parties have the burden of establishing that summary decision would be appropriate based on the papers submitted. *See Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, both parties are found to have sustained their burdens.

38. The issues of whether or not Kumra was an undisclosed real party-in-interest to Tubman's Elmira application is determined by evidence showing control, or absence of control, over the Elmira application. But issues of control where there is not a dispositive numerical standard (*e.g.* shares of voting stock) are *sui generis* and must be resolved by the special circumstances presented by the facts. *Metromedia, Inc.*, 98 F.C.C. 2d 300, 306 (Comm'n 1984). There is no precise formula by which all the factors can be evaluated but the concept of control includes any act, or series of acts, that vests in an individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue. *News International, PLC*, 97 F.C.C. 2d 349, 355 (Comm'n 1984). As to relevant factors, the Commission generally focuses on "control of finances, programming, personnel and, where appropriate, the selection of corporate board members." *In re Dorothy J. Owens*, 5 F.C.C. Rcd 6615, 6617 (Comm'n 1990). But none of the traditional factors of control are present here.

Absence Of Evidence Of Control

39. The only manner in which Kumra could exercise control over Tubman, a sole proprietor, would be through a management agreement. But as explicated in the findings, *supra*, under the Management Agreement that Tubman entered into with Western, Tubman had control over Western, the agent, and specific control over its actions with respect to material, records, facilities and equipment, hiring and firing of personnel, revenue, expenses, obligations and payments. (JM Exh. 5 at Para. 2.) In fact, while Kumra may have sought to exercise whatever control he had in an attempt to underbid for Elmira, Tubman avoided Kumra's efforts by accepting Crowley Cellular's better price. In the final analysis, Kumra was forced to sue Tubman to seek to enforce his own agreements, a choice of last resort for asserting a legal right, and not a remedy employed by someone who is in control over a business enterprise.

40. Tubman's claim in the state court action that Kumra was the real party-in-interest to Tubman's Elmira application is also contradicted by a considerable volume of documentary evidence from the period after Tubman won the Elmira lottery. The evidence shows that during the period when the Management Agreement (JM Exh. 5) was in effect, Tubman was actively involved in all aspects of Western's activities relating to the construction and financing of the Elmira system. Indeed, Tubman's own conduct confirms that Tubman reserved to himself the ultimate decisionmaking power with respect to the Elmira authorization. And ultimately, Tubman fired Kumra.

41. Tubman actively exercised his licensee's authority. He spent several days in Elmira to obtain financing, inspect the area for possible sites and to locate a possible new residence. Tubman ultimately decided alone to retain an independent attorney for the Elmira system as a replacement for the law firm that Kumra had selected, albeit with Kumra's consent. (TD at Tr. 119-20.) Tubman also conducted negotiations with Crowley Cellular and others regarding the possible sale of the Elmira authorization and, as Tubman noted, he was entitled to the ultimate decision making power because "it was my name that was on the license."[5] (TD at Tr. 549.) Tubman's activities tend to disprove the allegation that Kumra was the real party in interest to Tubman's Elmira authorization and such evidence meets Kumra's burden of proof.

Irrelevant Questions Not Addressed

42. Conclusions are proposed in the Joint Motion which would involve a ruling on the merits of the contractual dispute between Kumra and Tubman that was the subject of the settled civil lawsuit. The Presiding Judge rejects the request to reach those conclusions which are not relevant or necessary for determining the extent of Kumra's control over the Elmira cellular service allotment. (*See* Joint Motion at Pp. 16-18.) Similarly, Tubman's deposition testimony is only relied upon to determine whether Kumra was a real party-in-interest.

There is no public interest to be served in determining for purposes of this proceeding Tubman's credibility, or whether Tubman had breached a business agreement. (*See* Joint Motion at Pp. 20-24.)

Ultimate Conclusions of Law

43. The ultimate conclusions of law advanced by the Joint Movants are adopted as the law of the case. These are as follows:

A. There is no credible evidence supporting Tubman's allegation that Kumra/Western was the real party in interest to Tubman's Elmira application.

B. There is no basis for any adverse finding or conclusions with respect to Kumra's license qualifications.

C. Kumra possesses the requisite character qualifications to be the non-wireline cellular radio licensee for the San Luis Obispo RSA.

D. The granting of Kumra's application for the Block A cellular license in the San Luis Obispo RSA would be in the public interest, convenience and necessity.

ORDER

IT IS ORDERED that the Joint Motion For Summary Decision filed jointly on March 15, 1991, by Raveesh K. Kumra and the Common Carrier Bureau IS GRANTED.

IT IS FURTHER ORDERED that the application of Raveesh K. Kumra (File NO. 10019-CL-P-340-A-88) for the Block A Cellular license in the San Luis Obispo RSA IS GRANTED.

IT IS FURTHER ORDERED that unless an appeal from this Decision is taken to the the Commission, or unless the Commission reviews this Decision on its own motion in accordance with 47 C.F.R. §1.276 of the Commission's rules, this proceeding IS TERMINATED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] Frank H. Mirgon ("Mirgon") was made a party to this proceeding on March 27, 1990 (FCC 90M-642). Mirgon withdrew from the case on February 5, 1991, in connection with a settlement between Mirgon and Kumra which has been seen by Bureau Counsel and the Presiding Judge. The agreement is found to not appear to be contrary to the public interest. It is noted, however, that its provisions are not subject to a presiding officer's review. 47 C.F.R. §22.29. *See also* In re Revision and Update of Part 22 of the Public Mobile Radio Services Rules, 54 Radio Reg. 2d (P&F) 1661, 1680-81 (1984).

[2] The Management Agreement detailed the matters over which Tubman would retain control, including: access to all records and construction sites; ultimate decision on hiring and firing; ultimate control over revenues, expenses, obligations and payments. (JM Exh. 5 at Para. 2.)

[3] The copy of the FCC Form 490 reflects Tubman's signature but the date of its execution is blank. There also appears a "Void" stamp over Tubman's signature and the document is marked in two places as a "Draft." The document was not filed with the Commission. Based on these characteristics, it is concluded that no legal effect was intended for JM Exh. 14. However, its existence as a draft does provide evidence that corroborates Kumra's reasonable belief that he had negotiated a deal in principle with Tubman to receive an assignment of the Elmira authorization.

[4] Western was and is majority owner of the general partnership which holds the non-wireline license for the Lake Charles, Louisiana MSA. (JM Exh. 1 at Para. 4.)

[5] As a further indication of Tubman depriving Kumra of the control that he wanted, in negotiating over a draft of the Management Agreement (JM Exh. 26), Tubman succeeded in insisting that a provision be excised that would have given Kumra complete discretion to act on the Elmira project in Tubman's absence without obtaining any authorization. (TD at Tr. 547-48.)

[6] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d) (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-147

In re Applications of

RILEY M. MURPHY (hereafter "Murphy") File No. BPH-891214MW

ALPINE BROADCASTING CORPORATION (hereafter "ABC") File No. BPH-891214MX

For Construction Permit
for a New FM Station on Channel 281A
in Buena Vista, Colorado

HEARING DESIGNATION ORDER

Adopted: May 15, 1991; Released: June 6, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. ABC petitioned for leave to amend its application on June 7, 1990. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

3. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the petition for leave to amend filed by ABC IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

7. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, DC 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, DC 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-144

In re Applications of

BEAVER SPRINGS BROADCASTING LIMITED (hereafter "Limited") File No. BPH-900503MC

SUNBURY BROADCASTING CORPORATION (hereafter "Sunbury") File No. BPH-900503MF

MARY ANNE FLEISHER (hereafter "Fleisher") File No. BPH-900503ML

For Construction Permit
for a New FM Station on Channel 291A
in Beaver Springs, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: May 15, 1991; Released: June 6, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Multiple Ownership.* Sunbury is the licensee of FM station WQKX in Sunbury, Pennsylvania. Although Sunbury states in Exhibit 1 of its application that it does not have any interest in a broadcast station "... with overlapping signals in the same broadcast service", an examination of its instant application reveals that the 3.16 mV/m contours of WQKX and the proposed station herein overlap in violation of 47 C.F.R. § 73.3555(a)(2), the "duopoly rule". Accordingly, an issue will be specified.

3. Section II, Item 6 of FCC Form 301 (June, 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Sunbury has not completed Item 6 correctly. Sunbury's application gives no specific street address for its principal, John W. Keller, Jr. Accordingly, Sunbury must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

4. *Late-Filed Amendments.* Limited petitioned for leave to amend its application on March 25, 1991 and April 3, 1991. The accompanying amendments were filed after September 5, 1990, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. Data submitted by the applicants indicate there would be a significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Sunbury, whether the common ownership, operation and control of WQKX (FM) and the proposed station is consistent with 47 C.F.R. § 73.3555 (a)(2) of the Commission's Rules, and if not, whether a grant of the application would be in the public interest.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Sunbury shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Limited ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated in paragraph 4 above.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, DC 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, DC 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-483

In the Matter of

Amendment of Section 73.202(b),	RM-5995
Table of Allotments,	RM-6227
FM Broadcast Stations.	RM-6228
(Willmar, Princeton and Olivia, Minnesota) [1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 7, 1991

By the Chief, Allocations Branch:

1. In response to a petition filed by Kandi Broadcasting Company ("Kandi") the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 6791 (1987), proposing the allotment of FM Channel 291C2 to Willmar, Minnesota, as that community's second FM broadcast service. Kandi filed comments reaffirming its support for the channel at Willmar. Dr. J. D. Peterson filed a letter expressing support for a radio station in Willmar. Olivia Broadcasting Company ("OBC") filed comments and a counterproposal. [2] PM Broadcasting Company ("PM") filed a separate but conflicting petition for rule making involving Princeton, Minnesota. That petition has been accepted as a counterproposal in this proceeding. [3] Kandi and OBC filed reply comments.

2. PM, licensee of FM Station WQPM, Channel 292A, Princeton, Minnesota, requests the substitution of Channel 291C2 for Channel 292A at Princeton and modification of its license to specify the higher class channel. That petition conflicts with the proposal to allot Channel 291C2 to Willmar. According to PM, a transmitter site is available which meets all Commission spacing requirements for operation on Channel 291C2. PM states that it will promptly construct the new facilities upon grant of an application.

3. OBC filed a counterproposal requesting the substitution of Channel 291C2 for Channel 269A at Olivia, Minnesota, and modification of its license for Station KOLV(FM) to specify the higher class channel. In support of its request, OBC states that as a member of the American Agricultural Network, it provides vital, comprehensive news and information to its current listeners and, if permitted to upgrade, would provide this same service to additional area residents. According to OBC, only Channel 291C2 can be used to upgrade Station KOLV to Class C2 status, but there are several other channels that can be used at Willmar with reasonable site restrictions. OBC argues that the Commission should grant its counterproposal to allot Channel 291C2 to Olivia, modify its license accordingly, and allot an alternate Class C2 channel to Willmar.

4. OBC originally indicated that Channels 242C2, 245C2 or 255C2 could be used at Willmar. OBC subsequently stated in reply comments that upon further engineering review, it discovered that none of these channels can be used at Willmar. OBC comments that Channel 291C2 can be allotted to Willmar or Olivia or Princeton, but not to all three. OBC argues that using priorities established in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), Olivia should be selected because of greater gray area service. According to OBC, a Class C2 channel at Princeton would provide no gray area service, but a Class C2 operation at Willmar would provide gray area service to a 506 square kilometer area in which 6,219 persons reside and a Class C2 operation at Olivia would provide gray area service to a 1,161 square kilometer area in which 6,479 persons reside. OBC contends that the greater gray area service it would provide counter-balances the fact that Willmar has a greater population than Olivia.

5. Kandi responded to the counterproposals, urging the Commission to allot Channel 291C2 to Willmar as originally proposed. According to Kandi, OBC's engineering exhibit is in error. Kandi argues that if the gray area calculation is made using Kandi's proposed site and if other corrections are taken into account, its proposal for Willmar will provide a second service to more people than the OBC proposal for Olivia.

6. A staff engineering analysis found that Channel 237C2 can be allotted to Willmar with a site restriction 22.9 kilometers (14.2 miles) southwest. [4] The site restriction will prevent short spacings to Station KMXK-FM, Channel 235C2, Litchfield, Minnesota, Station KNOF, Channel 237A, St. Paul, Minnesota, and to Station KBBK, Channel 237A, Mora, Minnesota. Having located a nonconflicting channel for Willmar, the staff performed a search to determine if channels were available to accommodate the upgrade proposals at Olivia and Princeton, Minnesota. We were unable to locate an additional channel to resolve the conflict between Olivia and Princeton. Thus, we must choose between the conflicting proposals and base our decision on the following allotment criteria as set forth in *Revision of FM Policies and Procedures*, 90 FCC 2d 88 (1982):

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[co-equal weight given to priorities (2) and (3)]

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[1] The communities of Princeton and Olivia have been added to the caption.

[2] Public Notice was given on January 15, 1988, Report No. 1707 (RM-6228).

[3] Public Notice was given on January 15, 1988, Report No. 1707 (RM-6227).

[4] The coordinates for Channel 237C2 at Willmar are 45-01-20 and 95-18-14.

Our engineering analysis indicates that, contrary to OBC's comments, neither upgraded station would provide first or second full-time aural service. Since both communities (Princeton and Olivia) have existing FM stations, neither proposal will provide a first local service under priority three. In view of the foregoing, we believe it is appropriate to base our determination on which modification proposal should prevail under priority (4) of the allotment criteria, other public interest matters. This priority permits the Commission to compare the extended service areas proposed by each proponent. We conducted our own engineering and population analysis of the proposals to determine which could provide a new service to the largest population within the gain area of the predicted C2 service contours. *See Greenup, Kentucky and Athens, Ohio*, 2 FCC Rcd 4319 (1987), *aff'd in relevant part*, 4 FCC Rcd 3843 (1989), *aff'd in relevant part*, 6 FCC Rcd 1493 (1991).

7. After considering the result of our analysis, we conclude that the Princeton proposal should be adopted. Both proposals could provide a new reception service to residents within their predicted gain areas. Both proponents have indicated a need for a new service. However, as noted above, both communities cannot have the requested upgrade. We believe our decision, based on a comparison of the population within the predicted gain areas, will bring the benefits of a new service to a greater number of people. A comparison of the population totals indicates that adoption of the Princeton proposal would result in service to an additional 569,554 persons, while adoption of the Olivia proposal would result in service to an additional 86,934 persons [5] (*See* Appendix). Therefore, the counterproposal filed by Olivia Broadcasting Company to substitute Channel 291C2 for Channel 269A at Olivia, Minnesota, shall be denied. We will allot Channel 291C2 to Princeton, Minnesota, and modify the license of Station WQPM to specify operation on Channel 291C2.

8. Based on the above information, we believe the public interest will be served by the substitution of Channel 291C2 for Channel 292A at Princeton, Minnesota, in order to provide that community with a wide area FM service. Channel 291C2 can be allotted to Princeton in compliance with the Commission's minimum distance separation requirements at the petitioner's specified site. [6] We shall modify the license of Station WQPM to specify operation on Channel 291C2 in accordance with Section 1.420(g) of the Rules.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Princeton, Minnesota	291C2
Willmar, Minnesota	273C, 237C2

10. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WQPM, Princeton, Minnesota, IS MODIFIED TO SPECIFY operation on Channel 291C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That the counterproposal filed by Olivia Broadcasting Company (RM-6228) IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. The window period for filing applications on Channel 237C2 at Willmar, Minnesota, will open on **July 23, 1991,** and close on **August 22, 1991.**

14. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] Although OBC's reply comments indicate that an allotment to Olivia will serve a larger population than an allotment to Willmar, our analysis of their engineering statement found some omissions. OBC's engineering did not take into consideration that Channel 249A at Redwood Falls, Minnesota, Station KLGR-FM, has been upgraded from 249A to 249C1 and that Station KIVK, Alexandria, Minnesota, is allotted Channel 264C1 in lieu of Channel 259C. Also, the construction site coordinates instead of the licensed site coordinates were used for several stations in the engineering study. The Commission performs the comparative studies using maximum facilities for all classes of stations except for the full Class C stations. For these stations we look at the lesser of maximum or actual facilities. OBC performed their study of licensed stations using actual facilities regardless of the class of station.

[6] The coordinates for Channel 291C2 at Princeton are 45-22-19 and 93-51-18.

APPENDIX

The following is a summary of the population of the counties within the predicted gain area of a Class C2 service contour for Station WQPM, Channel 292A, Princeton, Minnesota. The percentage of increase indicates the predicted increase in coverage by Class C2 facilities over existing Class A coverage in the listed counties:

Counties

Mille (incr. from 40% to 45%) pop.	
18,430 x 5% =	922
Isanti (incr. from 50% to 60%) pop.	
23,600 x 10% =	2,360
Anoka (incr. from 5% to 50%) pop.	
180,364 x 45% =	81,164
Sherburne (incr. from 50% to 100%) pop.	
23,123 x 50% =	11,562
Hennepin (incr. from 0% to 50%) pop.	
570,460 x 50% =	285,230
Wright (incr. from 0% to 100%) pop.	
58,681 x 100% =	58,681
Carver (incr. from 0% to 10%) pop.	
37,046 x 10% =	3,705
McLeod (incr. from 0% to) pop.	
29,657 x 3% =	890
Meeker (incr. from 0% to 20%) pop.	
14,690 x 20% =	2,938
Stearns (incr. form 0% to 30%) pop.	
65,595 x 30% =	19,679
Benton (incr. from 20% to 95%) pop.	
25,187 x 75% =	18,890
	Total 486,021

The community of Litchfield, Minnesota (Meeker County) is not covered by the primary service contour and has not been included in the total. The following communities will be covered by the primary service contour but have been deducted from the above county populations.

Anoka in Anoka County	15,634
St. Cloud in Stearns County	42,566
Elk River in Sherburne County	6,785
5% of Minneapolis (pop. 370,951)	18,548

Addition of the population of the above communities to the subtotal of 486,021 results in the total increase in population to be served with the upgrade at Princeton, Minnesota, which is 569,554 persons.

The following is a summary of the populations of the counties within the predicted gain area of a Class C2 service contour for Station KOLV(FM), Channel 269A, Olivia, Minnesota. The percentage of increase indicates the predicted increase in coverage by Class C2 facilities over existing Class A coverage in the listed counties.

Counties

Renville (incr. from 70% to 100%) pop.	
20,401 x 30% =	6,120
Kandiyohi (incr. from 10% to 60%) pop.	
20,868 x 50% =	10,434
Meeker (incr. from 0% to 50%) pop.	
14,690 x 50% =	7,345
McLeod (incr. from 0% to 50%) pop.	
29,657 x 50% =	14,829
Sibley (incr. from 0% to 30%) pop.	
15,448 x 30% =	4,634
Nicollet (incr. from 0% to 5%) pop.	
17,873 x 5% =	894
Brown (incr. from 0% to 15%) pop.	
14,890 x 15% =	2,234
Redwood (incr. from 0% to 50%) pop.	
14,131 x 50% =	7,066
Yellow Medicine (incr. from 0% to 20%) pop.	
13,653 x 20% =	2,731
Chippewa (incr. from 0% to 40%) pop.	
9,096 x 40% =	3,638
	Total 59,925

The following communities will not be covered by the primary service contour and have not been included in the populations:

St. Peter (Nicollet County)	9,056
New Ulm (Brown County)	13,755
Montevideo (Chippewa County)	5,845

The following communities will be covered by the primary service contour:

Willmar (Kandiyohi County)	15,895
Litchfield (Meeker County)	5,904
Redwood Falls (Redwood County)	5,210

Addition of the population of the above communities to the subtotal of 59,925 results in the total increase in population to be served with the upgrade at Olivia, Minnesota, which is 86,934 persons.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-602

In the Matter of

Amendment of Section 73.202(b),	RM-7154
Table of Allotments,	RM-7447
FM Broadcast Stations.	RM-7448
(Vergennes, Vermont, Hague and Westport, New York [1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 6, 1991

By the Chief, Allocations Branch:

1. At the request of Thomas M. Pancoast ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 43 (1990), proposing the allotment of Channel 244A to Vergennes, Vermont, as that community's second local FM service. Petitioner filed comments restating his intention to apply for the channel, if allotted. Counterproposals were filed by Brian Dodge of Harvest Broadcasting ("Harvest"), requesting the allotment of Channel 244A to Westport, New York, as its first local FM service, and EFEM, Inc. ("EFEM"), requesting the allotment of Channel 244A to Hague, New York, as its first local FM service. [2] Petitioner and EFEM filed reply comments.

2. EFEM states that Hague is an incorporated community with a population of 766 persons. [3] EFEM notes that Hague has its own Volunteer Fire Department and Rescue Squad, a United States Postal Office, several churches and a Town Center over which the Town Clerk presides. EFEM also submits that Hague has a number of businesses located within the Hague corporate boundaries. EFEM states its proposal meets all the separation requirements, while the petitioner's proposal creates three short-spacings, including one that presumes Canadian concurrence with a directional antenna restriction to protect a short spacing to Station CKOI(FM), Channel 245C1, Verdun, Quebec, Canada. EFEM argues that the adoption of its proposal better serves the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC Rcd 2d 88 (1982), because it would provide a first local transmission service to Hague, as opposed to the addition of a second local FM service to Vergennes. EFEM states that it will file an application for a construction permit for a new broadcast station on Channel 244A, if allotted to Hague, New York.

3. Harvest, in its counterproposal, states that Westport is a town of 1,439 persons, located in Essex County which has a population of 36,176 persons. Harvest submits that Westport has a "good size downtown District" and presently has no aural transmission service. Harvest contends that Westport is worthy of its own radio station and indicated its intention to apply for Channel 244A, if allotted to Westport, New York. [4]

4. In response to EFEM, petitioner states that the counterproposal does not satisfy the Commission's city grade coverage requirements and is in error regarding several factors critiquing petitioner's proposal. However, petitioner purposes to eliminate the conflicts between Hague, Westport and Vergennes by substituting Channel 292A for 244A at Hague and Channel 273A for Channel 244A at Westport. In reply comments, EFEM believes its counterproposal should be favored over petitioner's proposal and Harvest's counterproposal because of technical inadequacies with the Westport allotment and the need for Canadian concurrence with the Vergennes' proposal.

5. We have carefully reviewed all of the pleadings before us in this proceeding and find that the public interest would be served by the provision of first local services at Hague and Westport as well as the addition of a second local service to Vergennes. While petitioner requested the substitution of Channel 292A for Channel 244A at Hague, we believe the allotment of Channel 229A to Hague would best serve the public interest. The allotment of Channel 229A in lieu of Channel 292A will eliminate any possible conflict with the Saranac Lake, New York, proceeding. [5] Further, since we have determined the availability of alternate Class A channels for use at Hague and Westport, New York, a comparative analysis is unnecessary. Channel 229A can be allotted to Hague, New York, and Channel 273A can be allotted to Westport, New York, in compliance with the Commission's minimum distance separation requirements. For Channel 229A at Hague, we will impose a site restriction of 12.2 kW (7.6 miles) north of the community [6] to avoid short-spacings to Station WSCG(FM), Channel 228A, Corinth, New York, and a construction permit (BMPH 880919ID) for Station WNYV(FM), Channel 231A, Whitehall, New York. [7] Since Hague is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. Channel 273A at Westport will require

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[1] The communities of Westport and Hague, New York, have been added to the caption.

[2] Public Notice of the filings of the counterproposals was given July 18, 1990, Report No. 1823.

[3] Population figures are from the 1980 U. S. Census.

[4] Harvest filed an amendment to its counterproposal on February 28, 1990, indicating an expression of interest for Channel 244A.

[5] In a separate proceeding, the Commission issued a *Notice of Proposed Rule Making*, 5 FCC Rcd 4009 (1990), adopted June 20, 1990, proposing the allotment of Channel 292C3 to Saranac, New York, as the community's second local FM service.

[6] We recognize that at an unrestricted site, Channel 229A at Hague is shortspaced to the proposed use of Channel 229A at Brandon, Vermont. However, in a separate proceeding, the Brandon allotment was modified to specify operation on Channel 268A. *See Report and Order* in MM Docket No. 89-487, 6 FCC Rcd 1760 (1990).

[7] The coordinates for Channel 229A at Hague, New York, are North Latitude 43-50-51 and West Longitude 73-26-43.

a site restriction of 0.9 kilometers (0.6 miles) northwest to avoid prohibitive interference to Station CBOF(FM), Channel 273C1, Ottawa, Ontario, and the operating allotment on Channel 274C1, Sherbrook, Quebec, Canada. [8] As proposed, Channel 244A can be allotted to Vergennes in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [9] We note the allotment to Vergennes does not meet the required mileage separation to Station CKOI(FM), Channel 245C1, Verdun, Quebec, Canada. Because the allotments at Vergennes and Westport create short-spacings to Canadian stations, we have obtained Canadian approval for Channel 244A at Vergennes and Channel 273A at Westport as specially negotiated short-spaced allotments.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Vergennes, Vermont	244A, 294C2
Hague, New York	229A
Westport, New York	273A

7. The window period for filing applications will open on **July 23, 1991,** and close on **August 22, 1991.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[8] The coordinates for Channel 273A at Westport, New York, are North Latitude 44-11-24 and West Longitude 73-26-35.

[9] The coordinates for Channel 244A at Vergennes are North Latitude 44-10-00 and West Longitude 73-15-18. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the eventual applicants for Channel 244A at Vergennes may avail themselves of the provisions of Section 73.213(c) with respect to Station WDOT(FM), Channel 241A, Warren, Vermont, and the vacant allotment, as well as the outstanding construction permit (BMPH-880809NC) and application (BMPH-901231ID), of Profile Broadcasting Company, Inc. for Channel 244A at Lisbon, New Hampshire.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-27

In the Matter of

Amendment of Section 73.202(b), RM-7549
Table of Allotments,
FM Broadcast Stations.
(Castle Rock, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 7, 1991

By the Chief, Allocations Branch:

1. At the request of Cowlitz Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 1237 (1991), issued in response to a petition for rule making proposing the allotment of Channel 296C3 to Castle Rock, Washington, as the community's first local FM transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Galaxy Broadcast Partners ("Galaxy") filed comments opposing the proposal.

2. In its comments, Galaxy, licensee of Station KSKD, Channel 296C1, Sweet Home, Oregon, argues that it operates on the same channel as the proposed allotment to Castle Rock, and that it is considering upgrading Station KSKD from a Class C1 station to a full Class C station, but the allotment of Channel 296C3 to Castle Rock would preclude such a change. Accordingly, Galaxy urges the Commission to locate an alternate channel for Castle Rock. Galaxy notes that petitioner originally requested a Class A channel, but amended its petition to specify a Class C3 channel before the *Notice* was adopted. Galaxy suggests that the allotment of a Class A channel may be the best method of balancing the interest in expanding service in Sweet Home.

3. In consideration of the above information, we believe the public interest would be served by allotting Channel 296C3 to Castle Rock as the community's first local FM transmission service. We note that Galaxy has not requested permission to upgrade Station KSKD to a full Class C station. Therefore, we will not consider the possibility that this station may, at some future time, request such a power increase in resolving this proceeding. Channel 296C3 can be allotted to Castle Rock in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.4 kilometers (6.5 miles) north to avoid short-spacings to the construction permit site for Station KMXI, Channel 294C, Lake Oswego, Oregon, as well as Station KSKD, Channel 296C1, Sweet Home, Oregon.[1] Since Castle Rock is located within 320 kilometers (200 miles) of the U.S.- Canadian border, Canadian concurrence has been obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Castle Rock, Washington	296C3

5. The window period for filing applications will open on **July 23, 1991,** and close on **August 22, 1991.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 296C3 at Castle Rock are North Latitude 46-22-10 and West Longitude 122-55-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-282

In the Matter of

Amendment of Section 73.202(b),	RM-7169
Table of Allotments,	
FM Broadcast Stations.	
(McComb, Mississippi and	
Kentwood, Louisiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 23, 1991; Released: June 6, 1991

By the Chief, Allocations Branch:

1. At the request of Dowdy Broadcasting Co., Inc. ("petitioner"), licensee of Station WXLT(FM), Channel 231C1, McComb, Mississippi, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 3311 (1990), proposing the reallotment of Channel 231C1 from McComb to Kentwood, Louisiana, as that community's first local FM service, and the modification of its license for Station WXLT(FM) to specify operation on the same channel in the new community. Petitioner filed comments reiterating its intention to apply for Channel 231C1 if allotted to Kentwood. No other comments were received.

2. We believe the public interest would be served by reallotting Channel 231C1 from McComb to Kentwood. Petitioner has demonstrated that the reallotment of Channel 231C1 to Kentwood (population 2,667) [1] would result in a preferential arrangement of allotments, as that community would receive its first local FM transmission service, as well as its first aural service. This action will not deprive McComb (population 12,331) of its only local aural transmission service, as Stations WAPF(AM), WAKK(AM), WHNY(AM) and WAKH(FM) are licensed to McComb. As proposed, we will also modify petitioner's license for Station WXLT(FM) to specify Kentwood as its community of license pursuant to Commission Rule 1.420(i). Channel 231C1 can be allotted to Kentwood, Louisiana, in compliance with the Commission's minimum distance separation requirements and can be used at Station WXLT(FM)'s present transmitter site. [2]

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 22, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Kentwood, Louisiana	231C1
McComb, Mississippi	289C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Dowdy Broadcasting Co., Inc. for Station WXLT(FM), IS MODIFIED, to specify operation on Channel 231C1 at Kentwood, Louisiana, in lieu of Channel 231C1 at McComb, Mississippi, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license (BLH-870909KB) except the community, as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its license (BLH-870909KB) except for the community as specified above and a license application (Form FCC 302) is filed within ten (10) days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Arthur Scrutchins, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figures are from the 1980 U. S. Census.
[2] The coordinates for Channel 231C1 at Kentwood are North Latitude 30-51-18 and West Longitude 90-39-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-151

In the Matter of

Amendment of Section 73.606(b), RM-7557
Table of Allotments,
TV Broadcast Stations.
(Victoria and New Braunfels, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 23, 1991; Released: June 6, 1991

Comment Date: July 29, 1991
Reply Comment Date: August 13, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KVCT(TV), Inc. ("petitioner"), licensee of Television Station KVCT, Channel 19, Victoria, Texas, requesting the reallotment of its channel to New Braunfels, Texas, and modification of its license accordingly. Petitioner also requests that Channel 19 be deleted from Victoria to accommodate this reallotment. Petitioner states that should this proposal be adopted, it will apply for the channel.

2. Petitioner advises that New Braunfels, which is listed in the 1980 U.S. Census as having a population of 22,402, presently has no television stations allotted to it. On the other hand, Victoria, which is listed in the 1980 U.S. Census as having a population of 50,695, has three television stations: Station KVCT; Station KAVU, Channel 25; and Station KZJI, Channel 31. In addition, Channel *47 has been reserved for non-commercial educational use. Thus, petitioner stresses that the reallotment of Channel 19 to New Braunfels would not deprive Victoria of its only television broadcast service but would bring a first local television service to New Braunfels.

3. We believe the public interest could be served by the reallotment of Channel 19 from Victoria to New Braunfels, Texas, and the modification of Station KVCT's license accordingly, pursuant to Commission rule 1.420(i), in order to provide a first local television transmission service to the community. We note that, according to the 1980 U.S. Census, 114 of New Braunfels 22,402 residents are included in the San Antonio Urbanized Area. We do not believe that the fact that such a small number of New Braunfels' residents reside in the San Antonio Urbanized Area calls into question whether New Braunfels is deserving of a first local service preference, or whether it should be credited with all of the television services licensed to the San Antonio Urbanized area. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094 (1990).

4. A staff engineering analysis reveals that Channel 19 can be allotted to New Braunfels in compliance with the Commission's rules regarding minimum distance separation requirements at petitioner's specified site. [1] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional channel at New Braunfels.

5. It should be noted that the Commission has recently imposed a freeze on television allotments, or applications therefore, near certain metropolitan areas, including Houston, pending the outcome of an inquiry into the spectrum needs of advanced television systems (ATV) in broadcasting. [2] While it imposed the freeze, the Commission also indicated that it will consider waiver requests on a case-by-case basis for petitions or applications which provide compelling reasons why this freeze should not apply to their particular situation. [3] While the proposed reallotment of Channel 19 to New Braunfels falls within the "freeze" parameters to the Houston market, it is further removed from that city than is the current allotment of Channel 19 at Victoria. We conclude that waiver of the freeze on allotment changes appears to be warranted under these circumstances. However, if the freeze is still in effect upon termination of this proceeding, petitioner must request a waiver of the freeze in filing its application for the new channel. In addition, since New Braunfels is located within 320 kilometers (199 miles) of the U.S.-Mexican border, we must obtain concurrence from the Mexican government for the proposal.

6. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Victoria, Texas	19+, 35, 21, *47	35, 21, *47
New Braunfels, Texas	--	19+

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

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[1] The proposed coordinates for Channel 19 at New Braunfels are 29-19-45 and 98-20-28.
[2] *See Notice of Inquiry*, 2 FCC Rcd 5125 (1987), and *Order*, 52 FR 28346 (1987).
[3] *See Order, supra.*

8. Interested parties may file comments on or before **July 29, 1991,** and reply comments on or before **August 13, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James A. Koerner, Esq.
Baraff, Koerner, Olender
& Hochberg, P.C.
2033 M Street, N.W.
Suite 700
Washington, DC 20036
(Counsel for Petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COMEX, INC. File No. 23196-CD-P/L-1-85

To establish additional facilities
for one-way Station KC1295 to
operate on frequency 152.24 MHz in
the Public Land Mobile Service at
Nashua and Epsom, New Hampshire

RAM COMMUNICATIONS OF MASSACHUSETTS File No. 21859-CD-P/L-1-85

To establish an additional facility
for one-way Station KSV956 to operate
on frequency 152.24 MHz in the Public
Land Mobile Service at Andover,
Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1991; Released: June 6, 1991

By the Commission:

1. ComEx, Inc. (ComEx) has filed an application seeking review of the action taken by the Chief of the Common Carrier Bureau (Bureau), *Memorandum Opinion and Order*, 3 FCC Rcd 2881 (Com. Car. Bur. 1988) (*Bureau Order*), which denied ComEx's petition for comparative hearing and reinstated the results of the lottery selection in which RAM Communications of Massachusetts, Inc. (RAM) was ranked first and ComEx second. RAM has filed an opposition and ComEx has replied. ComEx has also filed a supplemental pleading and a motion for stay of the *Bureau Order*. We affirm the *Bureau Order*,[1] but on different grounds discussed below.

I. BACKGROUND

2. In 1985 ComEx and RAM filed the captioned applications to establish additional one-way facilities to operate on frequency 152.24 MHz. By Public Notice, Report No. PMS-86-2 (October 9, 1985), the Commission announced that these applications were mutually exclusive by reason of potential electrical interference.[2] On November 26, 1985, the Commission held a Public Mobile Service lottery in which RAM was ranked first and ComEx second. By letter dated December 4, 1985, ComEx requested that the lottery results be set aside because on October 30, 1985 it had filed a request for comparative hearing pursuant to Section 22.33(c)(1) of the Commission's rules [3] which had not been resolved prior to the lottery. On February 14, 1986, the Bureau ordered that the results of the lottery be set aside and RAM's and ComEx's applications be designated for a comparative hearing.[4] The Bureau concluded that ComEx had demonstrated that its proposed additional transmitter locations were within 40 miles of its existing authorized station on the same frequency and that there was a sufficient demand by its existing subscribers for the expanded service. However, by *Memorandum Opinion and Order*, Mimeo No. 2966 (Com. Car. Bur., released March 5, 1986), the Bureau, pursuant to Section 1.113(a) of the rules,[5] set aside the *Hearing Designation Order* upon concluding that the *Hearing Designation Order* failed to dispose of a petition to deny filed by RAM and various related pleadings which had been filed by the parties.[6]

3. On May 20, 1988, by *Memorandum Opinion and Order*, 3 FCC Rcd 2881 (Com. Car. Bur. 1988) (*Bureau Order*), the Bureau denied ComEx's petition for comparative hearing and reinstated the results of the November 26, 1984 lottery in which RAM was selected first. In so doing, the Bureau found that inasmuch as both ComEx and RAM are existing carriers seeking to expand their operating co-channel systems, ComEx had not demonstrated that the public interest would be served by a comparative hearing. Citing the Commission's decision in *Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings (Second Report and Order)*, 93 FCC 2d 952 (1983), (*Lottery Selection Among Applicants), reconsideration*, 49 Fed. Reg. 49466 (1984), 57 Rad. Reg. 2d (P&F) 427 (1984), (*Lotteries Reconsideration)*, the Bureau stated that the Commission had allowed applicants to elect comparative hearings in lieu of lottery selection for the express purpose of permitting an existing carrier to demonstrate its extraordinary need for a particular frequency as against the need of a new applicant vying for the same frequency. The Bureau rejected ComEx's argument that if comparative hearings are limited to where an existing licensee is competing against a new applicant, an existing licensee would always be preferred. It pointed out that this argument was considered and rejected by the Commission in the *Lotteries Reconsideration* decision where the Commission stated that it did not intend "to establish an automatic presumption that an applicant seeking to expand an authorized system is to be preferred over a new applicant." *Bureau Order*, 3 FCC Rcd at 2882 (citing *Lotteries Reconsideration*, 57 Rad. Reg. 2d (P&F) at 437 n.15). Finally, the Bureau found that because ComEx had not made the required public interest showing, it was unnecessary to consider whether ComEx had adequately demonstrated a demand from its existing subscribers for expanded service. *Id.*

II. PLEADINGS

4. ComEx argues that the Bureau's determination limiting eligibility for comparative hearing to cases involving existing licensees competing against new applicants is contrary to the Commission's *Lotteries Reconsideration* decision and the Commission's rules. ComEx maintains that the Commission, in *Lotteries Reconsideration*, found that it would be unfair and contrary to the public interest to subject all existing licensees to a lottery and therefore allowed existing licensees seeking to expand their systems to elect comparative consideration of their mutually exclusive applications. According to ComEx, the Commission's only limitations concerning the eligibility of

existing licensees for comparative consideration were that: (1) the frequency sought is the same band as the frequency for which the applicant is already authorized, and (2) where the applicant seeks geographic expansion, the facility proposed must be for a location within 40 miles of the applicant's existing base station and there must be a demonstration of demand by existing subscribers for the expanded service. *See* Section 22.33(c)(1). Thus, ComEx argues that an existing licensee who satisfies the noted eligibility requirements is entitled, upon request, to a comparative hearing.

5. ComEx contends that the Bureau's determination that comparative proceedings are available only where an existing licensee is competing against a new applicant is unsupported by the Commission's rulings following its decision in *Lotteries Reconsideration*. ComEx argues that the Bureau has routinely designated for hearing applications of existing licensees that are mutually exclusive after finding that they met the criteria of Section 22.33(c)(1) of the rules. *See RAM Communications of Indiana, Inc.*, CC Docket No. 86-197, Mimeo No. 4850 (Com. Car. Bur., released June 4, 1986); *Radio Telephone Company of Daytona Beach, Inc.*, CC Docket No. 85-84, Mimeo No. 3678 (Com. Car. Bur., released April 4, 1985). ComEx points out that in other cases, such as *Radio Call Company of Long Island, Inc.*, 2 FCC Rcd 6772 (Mob. Serv. Div. 1987) (*Radio Call*), the Mobile Services Division (MSD) has denied requests by mutually exclusive applicants for comparative hearings without taking into account whether the applicants were new or existing licensees. Citing *Columbia Broadcasting System v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (*CBS*), ComEx avers that the unexplained departure from established precedent is unlawful.

6. ComEx also argues that the Bureau's denial of its request for a comparative hearing reveals an "institutional reluctance to set radio common carrier cases for hearing that is contrary to Section 309 of the Communications Act." It contends that Section 309(a) of the Communications Act, 47 U.S.C. § 309(a), whereby the Commission must find the public interest, convenience, and necessity will be served before granting an application, demands that an existing licensee who fulfills the criteria explicitly stated in Section 22.33(c)(1) of the rules is entitled to a comparative hearing. ComEx asserts that this is the case whether an existing licensee is competing against a new applicant or against another existing licensee. In any event, ComEx argues that a comparative hearing among existing licensees is in the public interest because the grant of a frequency to one existing licensee might offer greater benefits to the public than a grant of the same frequency to another licensee.

7. Citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), ComEx argues that the Bureau's finding restricting eligibility for comparative hearings only to those cases where an existing licensee is mutually exclusive with a new applicant is arbitrary because it treats similarly situated parties inconsistently. Finally, in its supplemental pleading, ComEx contends that the Bureau's determination that comparative hearings are not available to resolve mutual exclusivity conflicts between existing licensees was made without providing an opportunity for notice and comment, in violation of Section 553(b) of the Administrative Procedures Act (APA) 5 U.S.C.§ 553(b). Accordingly, ComEx requests that the Commission reverse the *Bureau Order*, rescind the lottery results, and reinstate the *Hearing Designation Order*.

8. In opposition, RAM argues that the *Bureau Order* properly denied ComEx's request for a comparative hearing. It points out that Section 22.33(c) of the Commission's rules specifies that while applicants may request a comparative hearing in lieu of the random selection process generally used to choose from among mutually exclusive applicants, the requesting party must satisfy several prerequisite criteria, including "a demonstration of how the public interest would be served by using a comparative hearing procedure." According to RAM, the Bureau properly found that ComEx had not demonstrated that the public interest would be served by a comparative hearing after having concluded that the Commission, in the *Lotteries Reconsideration* decision, never intended for comparative hearings to be available where, as here, two carriers are seeking to expand their existing frequencies. While RAM acknowledges that existing licensees' proposals for land mobile facilities are not identical, it asserts that the proposals vary in degree only and, in any event, the need for expeditious selection from among mutually exclusive applications outweighs whatever interest there might be in making refined distinctions between the proposals made by existing licensees. Moreover, RAM contends that ComEx has failed to demonstrate a demand from its existing subscribers for expanded service, as required by Section 22.33(c)(1) of the Commission's rules. RAM also contends that at the time ComEx filed its application, it did not demonstrate that it possessed held orders for Nashua service, or that there was a link between its customer base and a need for Nashua service.

III. DISCUSSION

9. In *Lottery Selection Among Applicants, supra*, the Commission authorized the use of random selection or lotteries to choose from among certain competing applicants in certain services, including all the public land mobile services (PLMS).[7] In authorizing lotteries for mutually exclusive PLMS applications, the Commission stated that the lottery was designed to "expedite the licensing process, so that all applicants, whether new entrants or existing carriers seeking another frequency, may have their applications expedited." *Id.* at 993. The Commission also made clear that Section 309(i) of the Act, 47 U.S.C. § 309(i), expressly empowers the Commission to use lotteries to grant initial construction authorizations for mutually exclusive applications if the public interest would be served. *Id.* at 956.[8] Since applications by existing licensees to serve new areas are for initial authorizations within the scope of 309(i), the lack of a comparative hearing here does not violate Section 309(a).

10. In *Lotteries Reconsideration, supra* at 436-37, the Commission adopted a procedure under which PLMS applicants in common carrier services could be eligible for a comparative hearing in lieu of a lottery to decide who would receive the license. The Commission identified two circumstances under which an applicant could demonstrate that a comparative hearing was justified: (a) where the applicant proposes to increase the capacity of its authorized system by adding transmitters, or (b) the applicant proposes to increase its geographic coverage by adding transmitter locations. To ensure that applicants would not attempt to circumvent our lottery procedures,

the Commission required an applicant to demonstrate that it proposed to add one or more transmitter locations within 40 miles of an authorized transmitter operating on the same frequency and that there is a demand from its existing subscribers for the proposed expansion service.[9] Applicants are also required to demonstrate "how the public interest would be served by using a comparative hearing procedure." 47 C.F.R. § 22.33(c).

11. We agree with ComEx that the fact that two existing licensees are involved here does not foreclose its right to request a comparative hearing under Section 22.33(c). We find, however, that in its request for a comparative hearing, ComEx failed to demonstrate that the public interest would be served by using a comparative hearing. ComEx argues that a comparative hearing would benefit the public interest because one system may offer advantages over the other. While we recognize that no two existing land mobile systems are identical and that one system may offer advantages over the other, we find that differences between the two systems are generally small and are not likely to be significant enough that comparative preference would be awarded in a hearing. In addition, while we do not foreclose the possibility of comparative hearings in cases involving two existing licensees, we believe that a comparative hearing in such cases would generally result (and in this case would specifically result) in unnecessary costs and delays with no overriding public interest benefits to be gained. Unlike the case where an existing licensee is competing against a new applicant, both applicants here face similar constraints as to their choices of frequencies. A comparative hearing would not ensure that both applicants would be able to expand their systems in an efficient manner. Accordingly, we find that ComEx has failed to satisfy the public interest requirement of Section 22.33(c) of our rules.

12. Furthermore, we disagree with ComEx that this conclusion is contrary to the Commission's *Lotteries Reconsideration* decision. In the *Lotteries Reconsideration* decision, the Commission explained that:

> When a carrier seeks to increase the capacity of an authorized system by the addition of channels, it will generally find it necessary to do so for both technical and economic reasons by the addition of channels in the same frequency band as those used on its existing system. Similarly, a carrier seeking to increase the geographic coverage of an authorized system by the addition of transmitter locations will need to apply for the same channels used on its existing system. In both of these cases, applicants may be limited in their choice of frequencies by factors that do not constrain new station applicants. A new applicant may simply apply for a different available frequency in the event of losing a licensing lottery, while an existing carrier may be precluded from expanding its authorized system in an efficient manner if the only frequencies compatible with its operations are awarded to another applicant by lottery, even though frequencies in other bands may be available.

Lotteries Reconsideration, *supra* at 436-37. The Commission further stated that:

> . . . mobile service frequencies of existing licensees, as opposed to new entrants, are not always fungible; in order for licensees to efficiently and economically expand frequencies or coverage area, certain adjacent or compatible frequencies must be used.

Id. Thus, in adopting Section 22.33(c), the Commission focused on the fact that the public interest may be served by permitting an existing licensee to request a comparative hearing when it is mutually exclusive with a new applicant. While the *Lotteries Reconsideration* decision did not specifically address what, if any, public interest benefit is gained by holding a comparative hearing where two existing PLMS licensees try to expand their service territories, we do not believe that two existing licensees will usually be able to demonstrate that the public interest would be served by designating these mutually exclusive applications for hearing. Nevertheless, such a determination must be made on a case-by-case basis, and Comex has not made a sufficient public interest showing here.

13. We find that the Bureau's conclusion that it is not in the public interest to designate these two applications for comparative hearing was correct. Our conclusion that comparative hearings are useful primarily when an existing PLMS licensee is competing against a new applicant is consistent with the Commission's decisions in *Lottery Selection Among Applicants* and the *Lotteries Reconsideration*. The need for expeditious service to the public generally outweighs the cost and delays that would result from a comparative hearing between two existing PLMS licensees.[10]

14. As to ComEx's argument that the the *Bureau Order* unlawfully departed from Bureau precedent, we note that whatever the propriety of the Bureau Order, the Commission is not bound by Bureau precedent. *See Amor Family Broadcasting Group*, 918 F. 2d 960, 962 (D.C. Cir. 1990). In this Order, we have further explained that the result of the Bureau's action was correct because ComEx failed to show how the public interest would be served by holding a comparative hearing in this case as required by Section 22.33(c) of the Commission's rules. In addition, we have overruled earlier Bureau decisions to the extent that those decisions are inconsistent with our action today. Moreover, in response to ComEx's concerns regarding the APA and *Melody Music*, we note that we are not foreclosing the ability of an existing applicant to make a public interest showing pursuant to Section 22.33(c) to justify a comparative hearing with another existing applicant. Therefore, ComEx's concerns are inapplicable here. In view of our finding that no sufficient public interest showing was made, it is unnecessary to address the issue of whether ComEx made a sufficient demonstration of demand from its existing subscribers for expanded service.

IV. ORDERING PARAGRAPHS

15. THEREFORE, IT IS HEREBY ORDERED that the Application for Review filed by ComEx, Inc. IS DENIED;

16. IT IS FURTHER ORDERED that the motion for stay filed by ComEx, Inc. IS DENIED;

17. IT IS FURTHER ORDERED that the *Bureau Order*, reported at 3 FCC Rcd 2881 (1988), IS AFFIRMED as modified herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] ComEx's motion for stay has been rendered moot by our decision herein.

[2] At the time the captioned applications were filed, ComEx was operating on frequency 152.24 MHz in the Manchester, New Hampshire area, and RAM was operating on the same frequency in the Boston, Massachusetts area. These systems do not interfere with one another. The captioned applications, however, represent extensions of each applicant's service area that would cause mutual interference.

[3] Section 22.33(c)(1) states that a mutually exclusive applicant is eligible to request a comparative hearing in lieu of the random selection procedure if it is:

> an applicant proposing to add one or more transmitter locations to an authorized station on the same frequency or frequencies for which it is already licensed and within 40 miles of existing transmitter locations on those frequencies, and when the applicant demonstrates in its application a demand by its existing subscribers for the expanded service.

[4] *See Memorandum Opinion and Order Designating Applications for Hearing*, Mimeo No. 2623 (Com. Car. Bur., released February 14, 1986) (*Hearing Designation Order or HDO*).

[5] Section 1.113(a) of the rules states that, "[w]ithin 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion."

[6] On February 24, 1986, RAM filed a petition to certify issues to the Commission, noting that the *Hearing Designation Order* had failed to address RAM's pleadings. In opposing ComEx's petition, RAM argued that a comparative hearing between two or more applicants seeking to expand their existing co-channel systems, such as RAM and ComEx, would not serve the public interest because the Commission envisioned retaining comparative hearings only in contested proceedings between an existing carrier and a new applicant vying for the same frequency. In addition, RAM argued that ComEx had failed to demonstrate a demand for its existing subscribers for expanded service.

[7] PLMS includes paging, two-way land mobile telephone sevice, two-way air-ground service, offshore telecommunications service, rural radio service and cellular radio service.

[8] As noted in para. 2, *supra*, the Commission held a lottery in which RAM was ranked first and ComEx was ranked second. Subsequent to the lottery, RAM was found qualified to be a Commission licensee, as required by Section 309(a) of the Act. Since ComEx had an opportunity to participate in the lottery, its argument that the Bureau violated Section 309 of the Act is without merit.

[9] Section 22.33(c)(1). In addition, Section 22.33(c)(2) provides that a mutually exclusive applicant seeking to add one or more frequencies on the same frequency band at the same location or within 40 miles may request that its application and those applications mutually exclusive with it be designated for a comparative hearing under the procedures set forth in Section 22.32 in lieu of being placed in a lottery.

[10] Prior to the *Bureau Order*, the Bureau had designated for comparative hearing the mutually exclusive applications filed by existing licensees without an explanation of the public interest showings. *See RAM Communications of Indiana*, *supra*, and *Radio Telephone Company of Daytona Beach, Inc.*, *supra*. Based on our review of *Lottery Selection Among Applicants*, the *Lotteries Reconsideration* decision and Section 22.33(c) of the rules, we find that to the extent that those decisions are inconsistent with our decision today, they are overruled. However, our ruling today will have no impact on those cases because they are now final.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

Bundling of Cellular Customer Premises Equipment and Cellular Service	**CC Docket No. 91-34**
and	
Petitions for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies	**CC Docket No. 91-33**

ORDER

Adopted: May 28, 1991; Released: May 30, 1991

By the Chief, Common Carrier Bureau:

1. On May 23, 1991, Telocator requested an extension of time to file reply comments in the above-referenced dockets.

2. Telocator states that the June 4, 1991 deadline for filing reply comments in the referenced dockets should be extended by 45 days to July 19, 1991, because the comments filed in both proceedings include economic studies, arguments and allegations concerning Telocator members that will require detailed analysis in order to formulate informed responses. With respect to CC Docket No. 91-33, Telocator further states that additional time is necessary to address comments seeking to expand the scope of the proceeding to re-examine the Commission's decision to deny the petition filed by the National Cellular Resellers Association.

3. In light of the complexity of the factual and legal issues raised in the above-referenced dockets, we agree with Telocator that additional time should be granted to prepare meaningful reply comments. Therefore, in order to promote administrative efficiency, a relatively brief extension of the common response date for all parties will be established. We cannot, however, find that Telocator has shown good cause for a 45 day extension of time. Therefore, the due date for filing reply comments IS EXTENDED to June 19, 1991. Accordingly, Telocator's request is granted in part and denied in part.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-83

In re Applications of

WILLIAM E. KUIPER, JR. File No. BPH-880125MA

GNS BROADCASTING File No. BPH-880126MH

Betty Jean Goulooze and John Robert McClure, Jr. d/b/a WALKER BROADCASTING CO. File No. BPH-880126NE

For Construction Permit for a New FM Station on Channel 263A in Walker, Michigan

Appearances

Leonard S. Joyce, Esq. on behalf of William E. Kuiper, Jr.; *Lauren A. Colby, Esq.* on behalf of GNS Broadcasting; *A. Wray Fitch, III, Esq.* on behalf of Betty Jean Goulooze and John Robert McClure, Jr. d/b/a Walker Broadcasting Company; and *Larry A. Miller, Esq.* on behalf of the Commission's Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: May 30, 1991; Released: June 7, 1991

I. PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of William E. Kuiper, Jr. ("Kuiper"), GNS Broadcasting ("GNS"), and Betty Jean Goulooze and John Robert McClure, Jr., d/b/a Walker Broadcasting Company ("Walker"), for authority to construct and operate a new FM commercial radio station on Channel 263A in Walker, Michigan. By an order released March 20, 1990, the Mass Media Bureau designated these applications for hearing (*Hearing Designation Order*, DA 90-248) on the following issues:

a) To determine whether there is a reasonable possibility that the tower height and location proposed by Kuiper would constitute a hazard to air navigation.

b) To determine which of the proposals would, on a comparative basis, best serve the public interest.

c) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. Kuiper's July 6, 1990 Motion for Summary Decision on Issue (a) was resolved in Kuiper's favor (*See Order*, FCC 90M-2421, released August 7, 1990), leaving only issues (b) and (c) to be tried at hearing.

3. The three applicants have stipulated that they are proposing identical coverage. Therefore, there is no significant difference in the areas and populations which will be served by these three applicants. *GNS Broadcasting*, Exhibit 5.

II. FINDINGS OF FACT

William E. Kuiper, Jr. (Kuiper)

4. William E. Kuiper, Jr. is an individual applicant. He is a life-long resident of Grand Rapids, Michigan, who since 1974 has resided at 1051 Fremont, N.W., Grand Rapids, Michigan. Mr. Kuiper's past and present residences are all within the 3.16 mv/m contour of the proposed Walker FM station (Kuiper Ex. 1).

5. If granted a construction permit for the Walker station, Kuiper will move to Walker and devote his full time and attention to the management and operation of the station (Kuiper Ex. 1).

6. Mr. Kuiper is a life-long member of the Highland Hills Christian Reformed Church, Grand Rapids, having served on various committees of the Church, and has taught Sunday School at the Church for the past three years (Kuiper Ex. 1).

7. William E. Kuiper, Jr. currently is the Assistant Vice President and Director of Furniture City Broadcasting Corporation, licensee of Radio Stations WFUR (AM/FM) in Grand Rapids, Michigan; Assistannt Vice President and Director of Dowagiac Broadcasting Company, Inc., licensee of Radio Stations WDOW AM and FM in Dowagiac, Michigan; and Assistant Vice Presdient and Director of Kalamazoo Broadcasting Company, Inc., licensee of Radio Station WKPR (AM) in Kalamazoo, Michigan. Kuiper Exhibit 3. Mr. Kuiper owns no stock in these companies. *Id.*

8. If granted the permit for Walker, Mr. Kuiper will resign his officerships and directorships in all three of these companies and sever all connections with those licensees and their stations prior to the commencement of program test authority of the Walker Station. *Id.* Other than these, Mr. Kuiper has no ownership interest in, or connection with, any broadcast stations or applications, nor any media of mass communications. *Id.*

9. Mr. Kuiper will devote full-time (at least 40 hours a week) to the management of the station as its General Manager. Kuiper Exhibit 2. He will set station policies and determine the music format; hire, fire, promote and supervise all station employees; be responsible for implementation of the station's EEO program and be responsible for maintaining the station's public inspection file; be the Station's Chief Operator; supervise sales and personally engage in some sales; and, will supervise and be responsible for the overall operation of the station.

10. Mr. Kuiper determined that he would be the General Manager of the Walker station at the time his application for Walker was filed on January 25, 1988 (Tr. 65). Prior to filing his Walker application, Mr. Kuiper was an applicant for a new FM station in Dewitt, Michigan (Tr. 65). He filed an integration and diversification statement in that proceeding on October 14, 1988, indicat-

ing that he intended to work full-time at the Dewitt station (Tr. 66.67). His Dewitt application was dismissed pursuant to a settlement agreement approved by *Memorandum Opinion and Order*, FCC 89M-2208 (released September 6, 1989).

11. From the late 1960's to the early 1970's, Mr. Kuiper was employed as a part-time announcer at WFUR in Grand Rapids, Michigan. Kuiper Exhibit 4. In 1973, he became a full-time employee at WFUR (AM/FM) and has been employed at those stations ever since. His duties at the WFUR stations (since 1973) have included announcing, music selection and engineering. Mr. Kuiper received his First Class Radio Telephone License in the mid 1970's and since that time, has gradually devoted more time at the WFUR stations to engineering and less to announcing. By 1980, Mr. Kuiper became Chief Operator of the WFUR stations and in the early 1980's, he became the stations' music director as well. Mr. Kuiper currently holds both of these positions. *Id.*

12. From 1984 to 1990, Mr. Kuiper made daily visits to WKJR and WQWQ in Muskegon Heights, Michigan (formerly licensed to Furniture City Broadcasting Corporation) to maintain equipment and discuss the operations of those Stations with their managers. *Id.* Mr. Kuiper also programmed music for WKJR. *Id.* Since the mid 1980's, Mr. Kuiper has made similar visits to Station WKPR-AM in Kalamazoo. Finally, Mr. Kuiper contacts the manager and contract engineer of WDOW (AM/FM) several times a month to discuss various engineering matters. *Id.*

13. If granted the Walker permit, Mr. Kuiper will provide for auxiliary power at the studios and transmitter of the station, to be used in case of loss of regular electrical power. Kuiper Exhibit 5.

GNS Broadcasting

14. GNS Broadcasting is a general partnership. Its two partners are George Franklin Grant and John W. Seymour, each of whom is a 50 percent partner GNS Ex. 1, p. 1.

15. John W. Seymour was born November 12, 1944, in Grand Rapids, Michigan. Presently, since 1981, he has resided at 8635 Je-Ne-Be Drive, N.E., Rockford, Michigan, outside the GNS 1 mv/m contour as depicted in the GNS application. *See* Kuiper Ex. 6. However, the predicted 1 mv/m contour on the 61 degree radial, the radial passing through Seymour's residence, indicates that the 1 mv contour extends 4/10 of a mile beyond the Seymour residence. Tr. 26; GNS Ex. 7. Mr. Seymour has resided within the service area of the proposed station for 37 of the pat 46 years. Prior to 1981, Mr. Seymour resided within the proposed service area of the station during the following years: December 1944 to October 1945; and October 1953 to May 1981. GNS Ex. 3.

16. From 1963 until March of 1967, Mr. Seymour managed an appliance store in Cutlerville, Michigan. Since that time, Mr. Seymour has been employed in the broadcast industry. Mr. Seymour was employed from March 1967 to December 1967 at WTRU, Muskegon, Michigan and WGRD, Grand Rapids, Michigan, as Chief Engineer; from January 1968 until July 1983 he worked at WERX, Wyoming, Michigan, as Chief Engineer; from August 1969 to the present at WGRD as Chief Engineer; from October 1970 until October 1975 at WMAX, Grand Rapids, Michigan, as Chief Engineer/Financial Manager (approximately September 1973-July 1974); from May 1974 until June 1970 Mr. Seymour worked at WQLR, Kalamazoo, Michigan, as Chief Engineer; from July 1972 until October 1986 at WGHN, Grand Haven, Michigan, as Chief Engineer; June 1973 until October 1985 at WCSG, Grand Rapids, Michigan, as Chief Engineer; from June 1976 until October 1982 at WSHN, Fremont, Michigan, as Chief Engineer; April 1977 until March 1983 he worked at WCNF, Whitehall, Michigan, as Chief Engineer; from June 1977 until September 1982 at WKBZ, Muskegon, Michigan, as Chief Engineer; and from September 1982 until March 1983 at WCNF as General Manager/Operations Manager. Additionally, Mr. Seymour was technical director of Regional Broadcast Group for WGRD, WGRD-FM, WTRU, WMGW AM/FM, WYFM, WPIC, WCNF, WKNY, WKOP, WAAL, WAMT AM/FM from May of 1977 until March of 1986. John W. Seymour is presently self-employed with Performance Radio Engineering, Inc., and has been doing business under that name since 1967. He is president and sole shareholder of said corporation. The company holds a contract to perform engineering services for Stations WGRD-FM, WKTH (AM) and WMAX (AM), Grand Rapids, Michigan, WKWM (AM), Kentwood, Michigan, and WMHG (FM) in Muskegon, Michigan.

17. Luann Sheridan, Mr. Seymour's wife, and Tracy Darby are each 50 percent partners in T&L Broadcasting. T&L Broadcasting filed an application on January 18, 1990 for a new FM station in Hillman, Michigan (Tr. 154). Hillman, Michigan is located in the northern tip of Michigan (Tr. 163). It is over 200 miles from Walker, Michigan. Luann Sheridan has committed to working in a management position at the Hillman station if the T&L application is granted (Tr. 164, 168). She will be the station's full-time Program Director (Tr. 166).

18. If granted a contruction permit for a new FM broadcast station at Walker, Michigan, Mr. Seymour will terminate his present employment and interest in Performance Radio Engineering, Inc., move to Walker and become employed full-time, a minimum of 40 hours per week, at the proposed station as its General Manager. In this capacity, he will supervise all aspects of the station's operations, including the overall supervision of the station's sales, programming, engineering and clerical departments; he will personally direct the station's relations with the community and with advertisers, and handle the hiring and firing of all personnel. (GNS Ex. 3).

19. George Franklin Grant is a black male, born September 27, 1950, in Battle Creek, Michigan. Mr. Grant presently resides at 1834 Linden, S.E., Grand Rapids, Michigan, 49507, within the service area of the proposed Walker station. If GNS is granted a construction permit for a new FM broadcast station at Walker, Michigan, however, Mr. Grant will move to Walker prior to going on the air with the new FM station. Mr. Grant has resided within the service area of the proposed station for the past 12 years. (GNS Ex. 2.)

20. From June of 1972 until September of 1972, Mr. Grant was employed at Station WOTV, Grand Rapids, Michigan, as Stage Manager; during the period of time between September 1972 and January 1973, while a student at Michigan Stte University, Mr. Grant was involved in a work study internship program at WKAR, East Lansing, Michigan where he was responsible for getting feeds, dubbing news feeds and getting them ready for on the air broadcast (Tr. 97-98); from January 1973 until June of 1973, he was employed at WJIM-AM/FM/TV, Lansing,

Michigan, as News Reporter (Radio); from July 1973 until October 1977. Mr. Grant worked at NBC, Burbank, California, as Page for netwrok shows from July 1973 unitl August of 1974, as Page Supervisor from August 1974 until May 1977, and as Assistant Broadcast Operations Coordinator from May 1977 until October 1977; and from approximately February 1978 until June of 1978, Mr. Grant was employed at KFWB, Los Angeles, California, as news assistant. Since August of 1978, Mr. Grant has been employed at Radio Station WKWM (AM), Kentwood, Michigan. His positions at WKWM include from 1978-1988 music director, program director and on-air personality. He assumed the position of station manager for WKWM in late 1979, early 1980, and continues to hold that position along with his progamming duties to the present time.

21. Mr. Grant has been involved in the following civic activities:

- U.S. Dept. of Housing and Urban Development, speaker, Grand Rapids, Michigan, 1988
- Kent County Literacy Council, Grand Rapids, Michigan, 1987
- YMCA, Grand Rapids, Michigan, 1987
- American Heart Association, Grand Rapids, Michigan, 1986
- Grand Rapids Giants Banquet and Award Committee, 1988, Co-Chariman, 1989-present, Grand Rapids, Michigan
- Grand Rapids Chamber of Commerce, Silent Observer Committee, Board Member, 1989-present, Grand Rapids, Michigan
- Grand Rapids Cable TV Advisory Forum, Board Member, 1990-present, Grand Rapids, Michigan
- Family Worship Center Church Media Dept., Department Head, 1988-present, Grand Rapids, Michigan
- 1990 City of Grand Rapids "Correct Count Census Committee", Member, 1990, Grand Rapids, Michigan
- March of Dimes Telethon (2 years), Talent

22. Neither GNS Broadcasting nor its general partners, George Franklin Grant or John W. Seymour have any attributable media interests. GNS Ex. 4, p. 1.

23. GNS proposes to install and utilize auxiliary power generating equipment at both its studio and transmitter sites to provide continuous service in the event of a power outage or other emergency. GNS Ex. 6, p. 1.

Walker Broadcasting Co.

24. Walker Broadcasting Company is a general partnership. The two general partners are Betty Jean Goulooze and Robert McClure, Jr., each of whom is a 50 percent partner. WBC Ex. 1, p. 1. Mr. McClure became aware of the allocation to Walker, Michigan through a circular mailed by Harold Munn, an engineer (Tr. 399). Mrs. Goulooze learned of the allocation through Dale Scholten who leased space on a tower owned by Mr. and Mrs. Goulooze. Mr. McClure was advised by Don Melford, the General Manager of WMAX-AM in Grand Rapids, Michigan, that the Gouloozes had an available tower (Tr. 397, 398). Mr. McClure called the Gouloozes to discuss the availibity of the tower (Tr. 414). He spoke first with Mr. Goulooze who indicated that his wife, Mrs. Goulooze, might be interested in applying for the allocation (Tr. 414). Mr. McClure called again and discussed the allocation with Mrs. Goulooze (Tr. 415). During the course of several conversations, they decided to form a partnership and apply for the station (Tr. 416, 420).

25. Mrs. Goulooze agreed to provide space on the tower she and her husband owned, as well as office and studio space for the new station if the Walker Broadcasting application was successful (Tr. 442, 444).[1] In exchange, Mr. McClure would pay the costs of prosecuting the application up until the time a construction permit was issued (Tr. 437).[2] After grant of the Walker Broadcasting Co. application, Ms. Goulooze will contribute 50 percent of all costs of constructing and operating the station (Tr. 352, 372, 437). If the application is granted, the partnership will reimburse Mr. McClure for all expenses incurred in prosecuting the application except for the initial capital contribution (Tr. 448). Mrs. Goulooze has made the initial capital contribution specified in the Partnership Agreement by paying certain partnership expenses (Tr. 339).

26. Mr. McClure is the proposed full-time (no less than 40 hours per seek) General Manager of the station. As such, he will have overall responsiblity for the operation and management of the station. He, along with Mrs. Goulooze, will be reponsible for hiring and firing, and Mr. McClure will have primary responsibility for programming. He will establish station policy, along with Mrs. Goulooze. WBC Ex. 1, p. 1.

27. Mr. McClure is currently employed as Vice President and Financial Officer for International Plastics, located in Greenville, South Carolina. Prior to initiation of program tests of the Walker station, he will terminate that employment and any and all other employment so that he may fulfill his integration pledge. WBC Ex. 1, p. 1. He will move to Walker, Michigan, if the application is granted. (Tr. 437).

28. Mrs. Goulooze is the proposed full-time (no less than 40 hours per week) Station Manager. She will have primary responsibility for implementing the station's EEO policies. Her duties will also include public affairs, community relations and supervision of the sales staff. She will assist in the managment of the overall operation of the station. She will, along with Mr. McClure, establish station policy and hire and fire employees (Tr. 358, 359). WBC Ex. 2, p. 1.

29. Mrs. Goulooze is currently employed as an outside sales agent by Professional Travel. She is hired by Professional Travel as an independent contractor and works approximately 25 hours per week. She will terminate any and all employment in order to effectuate her integration proposal as the station's proposed full time Station Manager.

Mr. McClure has had the following broadcast experience:

1973-1985

General/Station Manager of KHYM, Gilmer, TX; responsible for all day-to-day activities.

1977-Present

Supervised construction of KKKK-FM, Odessa, Tx; assisted in hiring original staff; Station Manager reports to McClure in his capacity as Vice President of Tower Power Corporation.

1980

Assisted in construction of KLXL, Dubuque, Iowa; same administrative responsibilities for KLXL as KKKK; station was sold in 1983-1984.

1977-1979

Helped contruct a 4-tower directional (approx.) station, KAKA, Dermott, Arkansas; involved in hands-on construction of station.

1982

WMAX-AM, Grand Rapids, MI; assisted in original staffing of station. Assisted in construction of a 4-tower directional AM facility to allow WMAX to go full time. Has since 1982 held some managerial responsibilities as Presdient of WMAX, Inc.; Station Manager reports to McClure.

1985-Present

Assisted in purchase and staffing of WFAM-AM, Augusta, Georgia; keeps company books as Vice President of Family Broadcasters, Inc.;

30. Mrs. Goulooze has been involved in the following civic activities located in Walker, Michigan, or within the proposed station's service areas:

1934-1990

Member of the Walker Christian Reformed Church where, from approximately 1950 to 1980 she served on the music committee and served as organist.

1990

Member of the Outreach Committee of the Walker Christian Reform Church.

Mid-1960's to early-1970's

Involved in fundraising activities on behalf of West Side Christian School.

1981

Raised funds as a volunteer for the American Cancer Society.

Walker Ex. 2, p. 2.

31. Mrs. Goulooze was born November 28, 1934 in Walker, Michigan. She has been a life long resident of Walker with the exception of only a few months (Tr. 332). WBC Ex. 2, p. 1. Mr. McClure is a resident of Taylor, South Carolina (Tr. 385). He will establish his residence in Walker, Michigan if the application is granted (Tr. 437).

32. Betty Goulooze, Robert McClure, Jr. and WBC have no attributable media interests. Mr. McClure has timely committed to divesting any and all of his media interest including, but not limited to, ownership interests, directorships, officerships and all employment prior to initiation of program tests by Walker Broadcasting Co. WBC Ex. 1, p. 3.

33. Mr. McClure's current media interests and/or connections included in his divestiture commitment are:

-- 50% stockholder of WMAX, Inc., licensee of WMAX 1480 AM, Kentwood (Grand Rapids), Michigan, and President and a Director of WMAX, Inc. (1982 to present).

-- Vice President and a Director of Tower Power Corporation, licensee of KKKK, Odessa, Texas (1977 to present).

-- Vice President and a Director of Family Broadcasters, Inc., licensee of WFAM, Augusta, Georgia (1986 to present)

-- Vice President and a Director of Missionary Broadcasters, Inc., a nonprofit missionary organization and current licensee of low power television station (CP) in Myrtle Beach, South Carolina (BPH-860918NQ).

WBC Ex. 1, p. 3

34. Walker Broadcasting Co. proposes to install auxiliary power both at the studio and transmitter sites in order to provide ongoing operations in the event of a power outage.

III. CONCLUSIONS OF LAW

William E. Kuiper, Jr.

35. On September 14, 1987, Kuiper filed an application for a new FM station at Dewitt, Michigan. On January 25, 1988, Kuiper filed his application for Walker, Michigan. The Walker application was dismissed by the Commission on March 23, 1988 for a tenderability defect. On October 14, 1988, while the Walker application remained dismissed, Kuiper filed an integration and diversification statement in the Dewitt proceeding and there stated his intention to work full-time in the management of the Dewitt station. On May 26, 1989, Kuiper's Walker application was reinstated by the Commission. On September 6, 1989, Kuiper's Dewitt application was dismissed pursuant to a settlement agreement. Thereafter, on March 20, 1990, the Walker application was designated for hearing. On June 14, 1990, Kuiper filed his integration and diversification statement in this proceeding, indicating his intention to work full-time in the management of the Walker stattion.

36. The date established for the submission of integration and diversification statements in this proceeding was June 14, 1990. At that time, Kuiper's Dewitt application had long since been dismissed. At no time did Kuiper have conflicting integration proposals. Kuiper is awarded 100% full-time quantitative credit for his proposal to work at the station as its general manager. The proposal is moderately enhanced by Mr. Kuiper's life-long residence within the proposed city grade service area and his participation in some small civic activity there; the promise of future residence in Walker enhances the proposal slightly. Kuiper's broadcast experience enhances the integration proposal to a minor degree, and his promise to utilize auxiliary power warrants a very slight enhancement.

GNS Broadcasting

37. Although Mr. Seymour's wife, Luann Sheridan, is proposing to work at a station in Hillman, Michigan, if her application there is successful, Mr. Seymour testified that if GNS receives the permit for Walker, he will work full-time at the facility. Hillman, Michigan, is over 200 miles from Walker, Michigan. Even so, Seymour's testimony on the point was unequivocal, and no evidence of record tends to contradict his claim. His integration proposal will be credited, and so will that of Mr. Grant. GNS receives 100% quantitative integration credit.

38. GNS receives a moderate enhancement of its integration proposal by virtue of Mr. Grant's status as a racial minority participant. GNS is also entitled to a substantial enhancement for the long-term service area residency of both of its partners (including participation in civic activities within the service area by Mr. Grant). The broadcast experience of the partners enhances the integration proposal to a minor degree, and the promises of future residence in Walker by both Seymour and Grant enhance the proposal slightly. The proposal is very slightly enhanced by GNS's plan to utilize auxiliary power.

Walker Broadcasting Co.

39. Walker Broadcasting is entitled to 100% quantitative integration credit for the proposed full-time quantitative integration of its two general partners. Mr. McClure will terminate any and all employment and any broadcast connections he may have in order to work full-time as the station's general manager. Mrs. Goulooze will also terminate any and all employment in order to effectuate her proposal to work as the station manager.

40. Mrs. Goulooze, a 50% general partner, is a life-long resident of Walker, Michigan. Mr. McClure, a 50% general partner, will establish his residence in Walker if the application is granted. These facts, combined with Mrs. Goulooze's participation in some civic activity in the community of license, warrant a moderate enhancement of the integration proposal. Mr. McCLure has had extensive broadcast experience, warranting a minor integration enhancement. Walker Broadcasting receives a moderate 50% enhancement for Mrs. Goulooze's female status. Finally, the integration proposal is very slightly enhanced by the promise to utilize auxiliary power.

IV. ULTIMATE CONCLUSIONS

41. Each of the applicants receives 100% quantitative integration credit; each of them proposes the use of auxiliary power, and there are no differences in the areas or populations that each would serve.

42. Kuiper receives a substantial enhancement for long-term service area residency and civic participation, and a slight enhancement for the promise of future community-of-license residency. He receives a slight enhancement for broadcast experience.

43. GNS receives a substantial 100% enhancement for long-term service area residency and civic participation, and a slight enhancement for the promise of future community-of-license residency; a slight enhancement by virtue of the partners' broadcast experience, and a substantial 50% enhancement for the minority racial status of one its partners.

44. Walker receives a substantial enhancement for the long-term community-of-license residency and civic participation of one of its 50% partners, and a slight enhancement for the promise of future community-of-license residency by the other 50% partner; a moderate enhancement because of the female status of one of its 50% partners; and a slight enhancement for the broadcast experience of the other of the partners.

45. GNS's 50% minority enhancement is viewed as equal to Walker's 50% long-term local residency/civic participation credit, and they are offsetting. With these two applicants each receiving slight enhancements for promises of future local residency and for broadcast experience, GNS's substantial 100% enhancement for long-term service area residency outweighs Walker's moderate 50% enhancement for female status, making GNS the preferred applicant herein. Kuiper comes last in this ranking.

Accordingly, IT IS ORDERED that unless an appeal is taken from this Initial Decision by a party, or it is reviewed by the Commission on its own motion, the application of GNS Broadcasting (File No. BPH-880126MH) IS GRANTED, and the applications of William E. Kuiper, Jr. (File No. BPH-880125MA), and Walker Broadcasting Co. (File No. BPH-880126NE) ARE DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] At the time the arrangement was made, the Gouloozes owned the tower, transmitter site and building (Tr. 442). The tower was later sold to Dale Scolten, but the sale required that space be made available on the tower to Walker Broadcasting Co. (Tr. 341, 342).

[2] Mr. McClure initially understood that he would pay all costs for engineering, legal and filing fees incurred in filing the original application with the FCC (Tr. 440). He and Mrs. Goulooze both now, however, understand that Mr. McClure will pay for prosecution expenses through grant of the application (Tr. 443, 437).

[3] In the event exception are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-314

In the Matter of

Amendment of Sections 1.420 and
73.3584 of the Commission's Rules
Concerning Abuses of the
Commission's Processes

MEMORANDUM OPINION & ORDER

Adopted: May 24, 1991; Released: June 7, 1991

By the Commission:

1. The Commission has before it a petition filed by the Law Offices of Dean George Hill, P.C. ("Hill" or "petitioner") seeking clarification or partial reconsideration of the *Report and Order* adopted in the above-captioned proceeding. [1] Hill asks the Commission to create an exception in the allotment context to the limitation on settlement payments that we imposed in the *Report and Order*. The National Association of Broadcasters ("NAB") has filed an opposition, to which Hill has offered a reply. For the reasons discussed below, the Commission finds that the Hill petition should be denied.

BACKGROUND

2. In the *Report and Order* adopted in this proceeding, we limited the amount and type of consideration that may be paid for the withdrawal of an expression of interest in allotment proceedings. Specifically, we prohibited any consideration in excess of the legitimate and prudent expenses incurred in preparing and filing the expression of interest. We determined that our prior policy of approving unrestricted settlements in allotment cases created an incentive to file competing expressions of interest for the purpose of extracting a profit from the settlement rather than for the legitimate purpose of prosecuting an application. To enforce our limitation on settlement payments, we imposed certain disclosure and certification procedures for the withdrawal of expressions of interest in FM and TV allotment proceedings. [2]

3. Petitioner asks the Commission to create an exception to the settlement limitation promulgated in the *Report and Order*. Specifically, Hill proposes that a party who files or plans to file a counterproposal in an allotment rulemaking case be allowed to pay more than legitimate and prudent expenses to a previously-filed party in return for the withdrawal its proposal. Hill believes this scenario has no potential for abuse because neither party possesses an incentive to file in the hopes of turning a profit on the settlement. According to Hill, the first filing party would not file simply on the off-chance that someone might later file and make a lucrative settlement offer. Similarly, Hill argues that the second filer has no incentive to file a sham proposal for settlement purposes because that filer would continue to be prohibited from collecting more than legitimate and prudent expenses in return for withdrawing its proposal. Hill contends that by granting previously-filed parties the flexibility to structure settlements, the Commission would promote spectrum efficiency. Moreover, petitioner argues that this approach is equitable; the prior filer is fairly compensated for foregoing a business opportunity, while the subsequent filer is granted an opportunity to obtain a valuable item.

4. NAB opposes the creation of "a seniority system," whereby filers of earlier expressions of interest may recover more than legitimate and prudent expenses when approached by subsequent filers. First, NAB argues that parties could manipulate the system so that it would be difficult for the Commission to know whether it was the prior or subsequent filer who actually initiated the settlement offer. Second, NAB claims that such an exception might create a "land-rush"-type atmosphere, with parties rushing to "stake their claim" by being the first to file an expression of interest. Such an atmosphere, according to NAB, would encourage the filing of expressions of interest by parties who have little interest in building a station, but who only want the ability to set a settlement price.

5. In reply, Hill terms NAB's first point a "red herring" since the identity of the party initiating settlement discussions is irrelevant; the only party eligible to receive monies in excess of expenses would be the prior-filing party. In response to NAB's "land-rush" argument, petitioner asserts that it is unrealistic to believe that a prior-filing party would expend the time and money to file a proposal to amend the table of allotments in the mere hopes that someone might file a competing expression of interest and be willing to negotiate a cash settlement.

DISCUSSION

6. After careful consideration of the petition, we conclude that our policy of limiting settlement payments in allotment proceedings should not be altered. We believe that anyone in the position to anticipate that another party will file a petition to create a particular allotment or to upgrade an existing station may abuse Hill's proposed seniority filing system. In other words, someone who learns that another party is interested in a particular allotment or upgrade may file a conflicting petition first, knowing that the interested party intends to file and is susceptible to settlement demands. Hill's proposal thus would encourage "races to the courthouse" between speculative filers and filers with *bona fide* interests in upgrading existing stations or building new stations in unserved or underserved communities.

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[1] *Report and Order* in MM Docket 87-314, 5 FCC Rcd 3911 (1990).

[2] The limitation on allotment proceeding settlement payments was one of several restrictions imposed in the *Report and Order* as part of a comprehensive effort to eliminate the potential for parties to abuse Commission processes. *See generally Report and Order*, 5 FCC Rcd 3911 (1990).

7. Moreover, the speculative filer could take advantage of Hill's proposed exception even if this filer lacks definite information that another party intends to file. The filer could ascertain, through research, that an existing licensee would benefit by upgrading its station. Under Hill's approach, such a filer could place himself in a position to reap a settlement windfall by filing a conflicting allotment proposal and then offering to withdraw that proposal so that the licensee would not be precluded from upgrading its station. In such situations, the speculative filer's costs and risks associated with filing are minimal compared to the benefit that he may gain from settlement.

8. As the above discussion indicates, Hill's proposed exception would create incentives to file speculative petitions for settlement purposes. We continue to believe that the public interest is served by prohibiting the payment of profitable consideration in return for the withdrawal of expressions of interest in allotment proceedings, regardless of the order in which parties file proposals.

9. Accordingly, IT IS ORDERED THAT the "Petition for Clarification or, Alternatively, Petition for Reconsideration" filed by the Law Offices of Dean George Hill, P.C., IS DENIED.

10. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-145

In re Applications of

RADIO LUMPKIN, INC. (hereafter "Radio") — File No. BPH-891214MI

DIXIE BROADCASTING CORPORATION (hereafter "Dixie") — File No. BPH-891214MK

GEORGIA WOMEN IN BROADCASTING, LIMITED PARTNERSHIP (hereafter "GA. Women") — File No. BPH-891214MO

PATRICIA C. CANNINGTON (hereafter "Cannington") — File No. BPH-891214MP

LUMPKIN BROADCASTING PARTNERS (hereafter "LBP") — File No. BPH-891214NC

For Construction Permit for
a New FM Station on Channel 257C2
in Lumpkin, Georgia

HEARING DESIGNATION ORDER

Adopted: May 15, 1991; Released: June 10, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *GA Women.* On February 23, 1990, the applicant filed an amendment to convert its filing status from an individual applicant to a limited partnership, adding three new limited partners. The amendment is incomplete in that GA Women merely provided the names of the new partners, but failed to provide the requisite Section II information with regard to these three new limited partners. *See Report and Order* in Docket 88-328, 4 FCC Rcd 3853 (1989). Accordingly, GA Women will be required to provide to the presiding Administration Law Judge within 30 days of the release of this Order an amendment containing all applicable Section II information pertaining to the legal qualifications of the three new limited partners.

3. *LBP.* Section III, Item 3 (Financial Qualifications) of FCC Form 301 (1989) requires an applicant to identify each source of funds, including the name, address and telephone number of the source and a contact person if the source is an entity. LBP lists a bank as the primary source of funding. However, LBP did not provide the name of a contact person for the entity as required by Section III. Accordingly, LBP will be required to provide to the presiding Administration Law Judge within 30 days of the release of this Order an amendment which corrects this omission.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Radio	October 29, 1990
Dixie	September 5, 1990
LBP	August 16, 1990
	November 21, 1990
	February 13, 1991

5. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by GA Women would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

6. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by GA Women would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That GA Women shall submit an amendment in accordance with paragraph 2, hereinabove, to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That LBP shall submit an amendment in accordance with paragraph 3, hereinabove, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Radio, Dixie, and LBP ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, DC 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, DC 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-451

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-6628
FM Broadcast Stations.
(Keokuk and Washington, Iowa)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 28, 1991; Released: June 7, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by David M. Lister ("Lister"), applicant for Channel 290C2 at Keokuk, Iowa (BPH-891227MF). [1] By *Report and Order*, 6 FCC Rcd 364 (1991), the Commission substituted Channel 237C1 for Channel 237A at Keokuk, Iowa, and modified the license of W. Russell Withers, Jr. ("Withers"), for Station KOKX-FM to specify operation on the higher powered channel. In order to accommodate the allotment of Channel 237C1, Channel 290C2 was deleted from Keokuk. [2] No comments in response to the petition for reconsideration were received.

2. Lister states that the Commission deleted Channel 290C2 from Keokuk based upon a finding that no interest in use of the channel had been expressed. However, he states that the Commission overlooked the existence of his application which was filed subsequent to the release of the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 4 FCC Rcd 7499 (1989) ("*Notice*"). Further, he states that his unopposed application was cut-off on August 6, 1990. Lister notes that the *Notice* stated that Channel 242C2 would serve as a substitute channel if Channel 290C2 was deleted from Keokuk. However, the *Report and Order* failed to order Lister to modify his application to specify Channel 242C2 and grant him cut-off protection. [3] Lister states that he will apply for Channel 242C2 at the transmitter site specified in Station KOKX(FM)'s construction permit (BPH-880505NU).

3. We believe the public interest would be served by granting Lister's petition for reconsideration. The Commission's staff inadvertently overlooked the existence of Lister's application. Had this not occurred, the *Report and Order* would have ordered Lister to modify his application to specify Channel 242C2. Therefore, we do so now. Lister will retain cut-off protection.

4. Accordingly, IT IS ORDERED, That David M. Lister modify his application (BPH-891227MF) for Channel 290C2 at Keokuk, Iowa, to specify operation on Channel 242C2.

5. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Memorandum Opinion and Order* to the applicant for Channel 290C2 at Keokuk, as follows: David M. Lister, 847 Todd Preis Drive, Nashville, Tennessee 37221.

6. IT IS FURTHER ORDERED, That the petition for reconsideration filed by David M. Lister IS GRANTED and this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public Notice of the filing of the petition for reconsideration was given on February 14, 1991, Report No. 1837.

[2] Channels 237 and 290 are 53 channels apart and thus require a minimum distance separation of 27 kilometers to avoid IF interference.

[3] At Withers' request, the license of Station KOKX(FM) was modified to specify operation on non-adjacent higher powered Channel 290C2 in lieu of Channel 237A. *See* 3 FCC Rcd 744 (1988). In addition, Channel 242C2 was allotted to Keokuk to accommodate competing expressions of interest in use of the higher powered channel. Withers sought reconsideration of the action modifying his license to Channel 290C2. Withers' reconsideration request was granted to the extent of vacating that portion of the *Report and Order* deleting Channel 237A from Keokuk and modifying his license for Station KOKX(FM) to specify Channel 290C2. *See* 4 FCC Rcd 7467 (1989). He also submitted an application for a construction permit on Channel 242C2 which was subsequently granted conditioned on the outcome of this proceeding. The *Report and Order* under reconsideration herein modified Withers' license for Station KOKX(FM) to specify Channel 237C1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-479

In the Matter of

Quests, Inc.
Linesville, Pennsylvania

Licensee of Radio Station
WAST(AM), Ashtabula, Ohio

Order to Show Cause Why the
License of Station WAST(AM)
Ashtabula, Ohio, Should
Not Be Revoked

ORDER OF REVOCATION

Adopted: May 30, 1991; Released: June 7, 1991

By the Chief, Mass Media Bureau:

1. This proceeding began on November 7, 1990, when the Commission released its *Order to Show Cause and Hearing Designation Order*, 5 FCC Rcd 6599 (1990) *Order to Show Cause)*, in which it ordered Quests, Inc. (hereinafter Quests or licensee) to show cause why its license for WAST(AM) should not be revoked. [1] The Commission specified an issue: "To determine whether Quests, Inc., violated § § 73.1740(a)(4) [2] and/or 73.1750 [3] of the Commission's Rules". The Commission also specified an issue to determine, in light of the evidence adduced, whether Quests possesses the requisite qualifications to remain a Commission licensee. Quests has failed to respond to the Commission's *Order to Show Cause*. Thus, pursuant to § 1.92(a) of the Commission's Rules, Quests has waived its right to a hearing. Accordingly, by *Memorandum Opinion and Order, FCC* 91M-1027, released March 21, 1991, Presiding Judge Joseph P. Gonzalez terminated this proceeding and certified this matter to the Commission for disposition pursuant to § 1.92(c) of the Commission's Rules.

2. This revocation is based upon the following uncontested facts. WAST(AM), Ashtabula, Ohio, has been off the air since 1981. From 1981 until 1984 the licensee had permission to be silent. A request for continued silence has been denied by the Commission and the station has been off the air since May 30, 1984, without permission and has not turned in its license as required by § § 73.1740(a)(4) and 73.1750 of the Commission's Rules. The licensee does not maintain an address in Ashtabula. The licensee no longer possesses the station's real or broadcast related property and is incapable of operation at this time. There has been some discord between the majority and minority stockholders in the licensee which apparently has left the licensee unable to engage in a transfer to an unrelated entity willing and able to restore service.

3. The licensee was ordered to file a written notice of appearance within thirty days of the receipt of the *Order to Show Cause* in order to avail itself of the opportunity to be heard pursuant to § 1.91(c) of the Commission's Rules. Quests has not filed a notice of appearance and such failure alone constitutes a waiver of the licensee's right to a hearing pursuant to § 1.92(a)(1) of the Commission's Rules. Additionally, Quests did not appear at the prehearing conference held January 10, 1991. Thus, Quests has failed to participate in the proceeding and has waived its right to a hearing. [4]

4. The majority stockholder of Quests, Arthur W. Cervi, Sr., has agreed to sell his 56% interest in the licensee to Phillip J. Cantagallo, for $5,000. Cantagallo holds 65% of the stock of WAQI, Inc. which holds 44% of the stock in Quests. The agreement was filed with the Commission on November 13, 1990, along with an Application for Consent to Assignment of Broadcast Station Construction Permit or License (File No. BAL-901113ED). The proposed assignee claims that the minority stockholders have been blameless in the matter of any FCC violations and that the assignor lacks the resources and desire to put the station back on the air. Cervi has furnished no written statement in mitigation or even explanation of the violations. Moreover, no information was submitted indicating that the minority stockholders would be capable of re-

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[1] Although the Commission's *Order to Show Cause* ¶¶ at 7-8 advised the licensee of possible forfeiture liability for willful or repeated violations of Commission Rules, because of the action taken herein, no forfeiture is being imposed.

[2] Section 73.1740(a)(4) provides:

In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, DC no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[3] Section 73.1750 provides:

The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[4] On January 9, 1991, the day before the scheduled prehearing conference, the Presiding Judge received a request to cancel the scheduled hearing because an assignment to transfer control of Quests had been filed with the Commission. However, the Judge ruled that the hearing had been waived and certified the case to the Commission.

turning the station to the air. In light of this fact, and the fact that station WAST(AM) has been silent without authority since 1984, the license will be revoked and the assignment application will be dismissed as moot.

5. In view of the foregoing, it is concluded that Quests has violated the provisions of § § 73.1740(a)(4) and 73.1750 of the Commission's Rules. Accordingly, the Commission ORDERS that the license of station WAST(AM), Ashtabula, Ohio IS REVOKED, effective immediately. This action is taken by delegated authority pursuant to § § 312(a)(3), (a)(4) and (c) of the Communications Act of 1934, as amended. [5]

6. It is further ordered that the application for assignment of license filed on November 13, 1990, by Arthur W. Cervi, Sr. and Phillip J. Cantagallo is dismissed as moot.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[5] *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n. 3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 18
May 31, 1991

Released: June 7, 1991

Responsible Accounting Officer

Annual Report Form M - Conversion to the Metric System

In compliance with the Metric Conversion Act of 1975 (Act), the Federal Communications Commission adopted the Metric System as the standard of measurement in 1976. However, the Annual Report Form M has not been revised to comply with the new standard of measurement. Therefore, to be in conformance with the Act, carriers required to complete Annual Report Form M are being advised to prepare to use the metric system in reporting measurements beginning with the 1991 Report.

Editorial changes will be made to the Instructions and Schedules of the 1991 Annual Report Form M to reflect metric units. The changes to the Form M instructions are described in Attachment A, and the changes to the Form M schedules are described in Attachment B.

This letter and attachments are issued pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291. Applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, must be filed within 30 days of the date of this letter. *See* 47 C.F.R. § 1.4(b)(2).

If you have any questions, contact Virginia Brockington at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

ATTACHMENT A

The editorial changes to Form M Instructions appear below.

GENERAL INSTRUCTIONS:

* * * * *

(j) Public reporting burden for this collection of information is estimated to average 1700 hours per response including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Washington, D.C. 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

* * * * *

S - STATISTICAL SCHEDULES

* * * * *

Conversion Factors:

To change miles to kilometers multiply by 1.6093 and then round to the nearest whole number.

Definitions for Schedule S-1 - Outside Plant Statistics

* * * * *

3. Kilometers of Cable - Sheath kilometers.

4. Kilometers of Wire in Aerial Cable - The number of conductors of physical transmission paths times the sheath kilometers.

* * * * *

6. Kilometers of Wire in Underground Cable - The number of conductors or physical transmission paths times the sheath kilometers.

* * * * *

8. Kilometers of Wire in Buried Cable - The number of conductors or physical transmission paths times the sheath kilometers.

* * * * *

12. Kilometers of Wire in Submarine Cable - The number of conductors or physical transmission paths times the sheath kilometers.

13. Kilometers of Wire in Deep Sea Cable - Similar definition as submarine cable above.

* * * * *

15. Kilometers of Wire in Intrabuilding Network Cable - The number of conductors or physical transmission paths times the sheath kilometers.

16. Total Cable - Total sheath kilometers of all cables should include fiber and coaxial cables; total kilometers of wire in all cables should include fiber in fiber cable and coaxial tube in coaxial cables.

* * * * *

18. Fiber Kilometers - Total deployed measurement of kilometers derived from taking the number of sheath kilometers times the number of fibers in the sheath.

19. Fiber Kilometers Lit - The portion of fiber kilometers that are equipped with electronics for transmission use or are ready for use.

* * * * *

21. Equipped Kilometers of Tube in Coaxial Cable - Coaxial sheath kilometers times the number of tubes equipped with electronics.

* * * * *

23. Trench Kilometers - Length of the ditch that contains the duct.

24. Duct Kilometers - The number of ducts times the trench kilometers.

* * * * *

26. Kilometers of System - Total distance between repeater sites making up microwave radio systems above 890 mhz. Where a system meets another company's system, only include kilometers to the border of the adjacent company. Do not include satellite systems in this total.

27. Kilometers of Radio Channel - Total kilometers of one-way radio channel used for message, special services, video, or protection. A radio channel consists of a single link using a microwave transmitter and receiver. The radio channel distance is the sum of the kilometers of each link associated with a transmitter-receiver pair. Where a radio channel interfaces with that of another company, only include kilometers to the border of the adjacent company. In the case of satellite systems, calculate kilometers as the terrestrial distance between the receiver and transmitter terminal locations and add a footnote to indicate the satellite kilometers included in the total.

28. Kilometers of Equivalent 4khz Telephone Channel - Number of equivalent 4khz telephone circuit kilometers that are equipped and on radio systems. This value is the weighted sum of the number of 4khz circuits on each link times the length of the link and is larger than the radio channel kilometers unless most radio systems carry no active circuits.

29. Total Equipped Channel Kilometers- Total equivalent 4khz telephone grade circuit kilometers in carrier plant.

30. Equivalent 4khz Analog Carrier Channel Kilometers- Includes open wire, paired cable (K, N1, N2, N3, N4, ON, ON/K), microwave radio (TL, TM, TD2, TD3), and other analog microwave. (Reported in circuit kilometers for interoffice only.)

31. Weighted DS-1 Digital (or Equivalent) Carrier Channel Kilometers-Includes lightguide (fiber) cables, digital subscriber paired cable (T1, T1C, T1D, T2), microwave radio (DR11-40, other digital microwave).(Reported as equivalent 64kb/sec circuit kilometers for interoffice only.) Weight each DS-1 channel by multiplying by 24 before entering this data item, since a DS-1 can be equipped with up to 24 voice grade circuits operating at 64kb/sec.

32. Video - Kilometers of derived video channel. (Interoffice only.)

* * * * *

34. If an entry would be a fraction of a kilometer, show the exact amount or show an entry less than 1 kilometer as 1.

* * * * *

Specific Instructions for Statistical Schedules

SCHEDULE S-1 - Outside Plant Statistics

* * * * *

2. Report the kilometers at the end of the year for all solely owned plant and respondent's proportionate interest in jointly owned plant.

* * * * *

4. In columns (b) through (p) include fiber cable with other cable types. For column (p) include kilometers of fiber and kilometers of wire in the total.

5. Kilometers of fiber and kilometers of coaxial tube should be included in columns (d), (f), (h), (j), (l), (n), and (p) along with wire kilometers even though the heading states "wire".

6. In column (o), the kilometers in cable is the total of columns (c), (e), (g), (i), (k) and (m).

7. In column (p), the kilometers of wire in cable is the total of columns (d), (f), (h), (j), (l) and (n).

8. For columns (q) and (t) provide only the number of fiber kilometers "lit" or equipped with electronics and the number of tube kilometers of coaxial equipped with electronics. Usually a fiber or coaxial tube is considered equipped when it is capable of handling the first active circuit. Do not provide total sheath kilometers.

9. For column (r) provide the total deployed fiber kilometers, not just the amount equipped with carrier equipment or in service.

10. In columns (w), (x), and (y) report the aggregate number of kilometers of system or channel, as appropriate, between the individual stations or radio-relay systems. In column (y) include 64kb/sec digital circuit kilometers in the total, where applicable.

SCHEDULE S-5 - Interstate Private Line Statistics

* * * * *

2. * * * *

* * * * *

"Pricing distance" denotes the measurement of distance for which charges are made in accordance with the service contract at a basic rate regardless of the physical routing of the circuit or the basis of measurements of the distance, whether airline, railroad, operating, etc.

* * * * *

Checklist for Schedules S-1 through S-4

* * * * *

2. (Schedule S-1): Please check the number of kilometers of wire (column (p)) and the kilometers of cable (column (o)) and be sure you have provided all required data. Also be sure you have provided wire kilometers in column (p) and not sheath kilometers.

3. (Schedule S-1): Kilometers of cable - Be sure that column (o) equals the total of columns (c), (e), (g), (i), (k), and (m).

4. (Schedule S-1): Kilometers of wire in cable - Be sure that column (p) equals the total of columns (d), (f), (h), (j), (l), and (n).

5. (Schedule S-1): If you have not included or have indicated as zero a figure for the number of fiber kilometers of fiber which is lit or equipped with carrier equipment in column (q), note that this data is now required.

6. (Schedule S-1): If you have not included a figure for the total number of fiber kilometers of fiber (lit and dark) deployed (column (r)) and you have in your facility base, be sure that this information is provided.

7. (Schedule S-1): Please be sure that the number of fiber kilometers of lit fiber (column (q)) is less than the total number of fiber kilometers (column (r)).

8. (Schedule S-1): The number of equivalent 4khz channel kilometers (column (y)) should be greater than the number of kilometers of radio channel (column (x)), and the number of radio channel kilometers (column (x)) should be greater than the number of radio system kilometers (column (w)). Any nonzero entry in column (w) should generally be matched with nonzero entries in columns (x) and (y) and vice versa. Be sure that all required data are provided in columns (w), (x), and (y).

9. (Schedule S-1): If columns (z) and (aa) (carrier channel kilometers) are zero or blank, be sure all applicable data have been provided.

10. (Schedule S-1): If column (aa) is more than 100 million or less than 1 million, recheck the number and be sure that the number of DS-1 kilometers is appropriately weighted by 24.

* * * * *

ATTACHMENT B

The editorial changes to Form M Schedules appear below.

Schedule S-1, Outside Plant Statistics

The column headings for columns (b) through (y) read as follows:

(b): Kilometers of Aerial Wire
(c): Kilometers of Cable
(d): Kilometers of Wire in Cable
(e): Kilometers of Cable
(f): Kilometers of Wire in Cable
(g): Kilometers of Cable
(h): Kilometers of Wire in Cable
(i): Kilometers of Cable
(j): Kilometers of Wire in Cable
(k): Kilometers of Cable
(l): Kilometers of Wire in Cable
(m): Kilometers of Cable
(n): Kilometers of Wire in Cable
(o): Kilometers of Cable
(p): Kilometers of Wire in Cable
(q): Fiber Kilometers Equipped with Electronics (Lit)
(r): Total Fiber Kilometers Deployed (Lit and Dark)
(s): Number of Poles
(t): Equipped Kilometers of Tube In Coaxial Cable
(u): Trench Kilometers
(v): Duct Kilometers
(w): Kilometers of System
(x): Kilometers of Radio Channel
(y): Kilometers of Telephone Channel (Equivalent 4KHz & 64Kb/s)

The heading overriding columns (z), (aa) and (bb) reads as follows:

Total Equipped Channel Kilometers (Cable and Microwave Systems)

Schedule S-5, Interstate Private Line Statistics

The column heading for column (d) reads as follows:

(d): Pricing Distance
(In Kilometers)

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 7, 1991

PLEADING CYCLES ESTABLISHED FOR COMMENTS ON PETITION FOR RULEMAKING AND PETITION FOR WAIVER CONCERNING COMPOSITION OF NECA'S BOARD

The HB National Exchange Carrier Association, Inc. (NECA) filed a petition for rulemaking on May 24, 1991, and a petition for waiver on May 28, 1991, to permit the addition of two directors from outside the telephone industry to NECA's Board of Directors. Section 69.602 of the Commission's Rules, 47 C.F.R. § 69.602, presently requires that the NECA Board consist of fifteen directors. Section 69.602 also specifies that three of these directors are to be selected by and represent the Bell Operating Companies, three are to be selected by and represent other telephone companies having annual operating revenues in excess of $40 million, and nine are to be selected by and represent telephone companies having annual operating revenues of less than $40 million.

In its petition for rulemaking, NECA asks that Section 69.602 be amended to add two outside directors to the NECA Board, effective January 1, 1992. NECA indicates that the addition of these directors would increase public confidence in NECA's overall management and processes. NECA proposes that its members select the outside directors from a list of nominees to be prepared by the NECA Board's Election Committee. NECA also states that the Election Committee would solicit qualified candidates from the business, professional, financial, and academic communities, and that the nominees would exclude current or former officers or employees of NECA or of NECA member companies, relations of such officers or employees, and persons having a business relationship or other interest that could interfere with the exercise of independent judgment as a director.

In its petition for waiver, NECA asks that Section 69.602 be waived to permit NECA to include two outside directors in the directors to be elected for calendar year 1992. NECA states that its annual Board election is presently scheduled for November 6, 1991, and that the requested waiver would ensure that the outside directors would be added expeditiously and without the expense of a special election.

Interested parties may file comments on NECA's petitions no later than **July 10, 1991**. Replies should be filed no later than **July 25, 1991**. Comments and replies regarding the petition for rulemaking should not be combined in the same document as comments and replies regarding the petition for waiver. Comments and replies regarding the petition for rulemaking should reference RM 7736. Comments and replies regarding the petition for waiver should reference file number AAD 91-28. All comments and replies in these proceedings should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, DC 20554. A copy of each filing should be sent to William A. Kehoe III, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, DC 20036, and to the Downtown Copy Center, 1114 21st Street, N.W., Washington, DC 20037. Copies should be available from Downtown Copy Center at (202) 452-1422.

For further information contact William A. Kehoe III at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Exemption of Certain Radio Devices To be Used By Law Enforcement Agencies From the Commission's Equipment Authorization and Licensing Requirements	RM-7335

ORDER

Adopted: June 3, 1991; Released: June 7, 1991

By the Chief, Private Radio Bureau, and the Chief Engineer, Office of Engineering and Technology:

I. INTRODUCTION

1. On February 28, 1990, the law firm of Dennis C. Brown and Robert H. Schwaninger ("Petitioner") filed a Petition for Rule Making to exempt certain low power devices used by law enforcement agencies from the authorization and licensing requirements specified by Parts 2, 15, and 90 of our Rules.[1] The petition is denied because the Commission's equipment authorization mechanism and licensing requirements remain the best means to protect against potential interference caused by these devices.

II. PETITION

2. Petitioner claims that the specialized needs of law enforcement agencies for surveillance purposes cannot be met under the Commission's current rules. Petitioner argues that the nature of police investigation often requires custom-designed or specialized equipment, including low power devices. *Petition* at 3. These low power communications devices, such as audio and video transmitters, remote radio switches and radio beacons, must currently obtain equipment authorization as required by Part 15 of our Rules. 47 C.F.R. Part 15. Petitioner believes that in balancing potential radio interference against the potential for inadvertently interfering in the administration of justice, the Commission should exempt low power devices from FCC equipment authorization requirements to "facilitate the technical side of law enforcement." *Petition* at 4.

3. In addition, Petitioner points out that manufacturers for these devices have little incentive to develop separate devices to satisfy the technical requirements of various law enforcement agencies. In characterizing the market as too small to attract investment by major manufacturers, Petitioner concludes that law enforcement agencies cannot find individualized devices that comply with the Commission's Rules. Because of this alleged equipment shortage, Petitioner asserts that law enforcement agencies have used equipment that has not received the requisite FCC authorization.[2] If the costly FCC authorization process could be avoided, Petitioner argues, there would be greater incentive for manufacturers to develop and provide equipment to law enforcement agencies.

4. Petitioner requests an exemption for the limited sales and use of low power communication devices to law enforcement agencies. Petitioner suggests that such low power equipment would be exempt from our rule on the marketing of radio frequency devices that requires equipment authorization before the sale or lease of any radio frequency device. *See* 47 C.F.R. § 2.803. By exempting these low power devices from FCC equipment authorization, manufacturers would more readily market and sell such low power devices. Petitioner outlines various requirements for manufacturers to meet. [3] Any law enforcement agency eligible for licensing in the Police Radio Service would be permitted to operate transmitters conforming to the technical conditions proposed by Brown and Schwaninger without a license. The petition also requests exemption from the requirement that land mobile transmitters be type accepted. *See* 47 C.F.R. § 90.203. The law enforcement agency would be held responsible for resolving any interference complaints. *Petition*at 7-8 and Appendix.

III. COMMENTS

5. We received several comments responsive to Brown and Schwaninger's proposal.[4] AID-Fort Lauderdale, a manufacturer of low power equipment, opposes the Petition, urging that law enforcement users, non-law enforcement users, and the general public are entitled to the Commission's supervision over design, performance, and interference standards of such equipment.[5] Similarly, AID-Mid-Atlantic predicts that if the type acceptance requirement is removed for these devices, low power transmitters of dubious quality will proliferate the market and will reach persons not involved in law enforcement activities.[6] APCO opposes RM-7335 because of potential interference likely to be caused by such unauthorized devices, but suggests that the Commission explore whether other rule changes may foster greater competition in the equipment marketplace.[7]

6. HDS, a research and manufacturing firm, endorses further Commission action that would encourage the development of application-specific devices at low prices.[8] HDS notes that spreading the high design costs for these devices over a limited number of produced units in addition to the FCC authorization testing results in an expensive unit price which few law enforcement agencies can afford. *Id.* at 3. HDS expresses concern, however, that "garage shop" laboratories would produce low power eavesdropping devices which would be sold illegally to the general public. *Id.* at 4. NATIA, a professional association of law enforcement officers, also supports several aspects of the petition, but notes that poorly manufactured equipment may cause undue interference and some proposals may hinder efforts of the law enforcement community.[9] Sheriff Tom Purvis of Mobile County, Alabama, fully supports the petition and urges the Commission to take steps to increase the amount of specifically designed radio equipment available for this limited public safety purpose.[10]

IV. DISCUSSION

7. Pursuant to Section 302 of the Communications Act, the Commission regulates the interference potential of devices that are capable of emitting radio frequency energy that cause harmful interference to radio communications. 47 U.S.C. § 302. The primary purpose behind Section 302 and our rules and regulations is to reduce probable levels of harmful interference.[11] Unless otherwise excepted, RF devices may not be sold, leased, or marketed without prior Commission authorization such as type approval, type acceptance, notification, verification, or certification. 47 C.F.R. §§ 2.803, 2.805, 2.902-2.907. The Commission grants applications for equipment authorization based on a determination that the equipment complies with pertinent technical standards and that the grant would serve the public interest, convenience and necessity. 47 C.F.R. § 2.915(a).

8. Authorization procedures are particularly relevant where equipment has a high potential for creating interference problems, is used in highly congested radio services, and is used in new areas of technology. *Report and Order*, Gen. Docket No. 82-242, 52 Rad. Reg. 2d (P&F) 1607, 1612 (1983) (adding a notification procedure as one level of equipment authorization). In developing the equipment marketing rules in Sections 2.803 and 2.805, the Commission stated that the equipment authorization rules are designed to reduce harmful interference problems by applying control measures at the source of the offending devices: the manufacturers, importers, sellers, and shippers of RF devices. *Report and Order*, 23 FCC 2d at 81.[12]

9. Petitioner urges that by creating an equipment authorization exemption for these low power devices, "the Commission will be recognizing that the need for such equipment is so great that the risk [of harmful interference to other users] is worth the benefits to be reaped by the public [through assisting law enforcement agencies in their fight against drugs]."[13] Petitioner acknowledges, however, that these unlicensed devices can create harmful interference to other users, but maintains that any risk to the spectrum will be intermittent and that no entity will suffer long-term or irreparable harm. *Id.* Equipment authorization inherently places some burdens on manufacturers to design and test their devices in order to protect the public from the potential of harmful interference. Low power devices do not negate the need for equipment authorization.[14] In some cases, a diminished potential for interference because of low power use may support a less burdensome equipment authorization procedure but not necessarily a total exemption. In this case, the benefits to be gained from the distribution and use of such unauthorized low power equipment do not outweigh the risk of harmful interference, and, therefore, the public interest is not served.

10. Petitioner fails to establish law enforcement agencies' need for low power devices that do not demonstrate compliance with the Rules. In trying to show market scarcity of low power devices, Petitioner states that local equipment dealers have provided non-FCC approved equipment to local police agencies at police request.[15] Non-compliance with Commission Rules does not, however, necessarily show a scarcity of available, approved devices. In fact, several commenters state that FCC type accepted, low power devices and audio transmitters that are capable of being used for law enforcement purposes are currently available on the market.[16] In addition, commenters express concern that unauthorized devices could well become available to the general public, cause harmful interference, and hinder law enforcement activity.[17] Similar concerns exist regarding the potential for widespread distribution of devices and transmitters of dubious quality and unreliable performance.[18]

11. Petitioner not only requests an exemption from authorization for low power equipment, but also proposes the unlicensed operation of such Part 90 land mobile transmitters. *See Petition* at Appendix. Under the Rules, state and local governmental entities are eligible to hold authorizations to operate radio stations for official police communications and activities. 47 C.F.R. § 90.19. Part 90 requires that transmitters utilized for land mobile transmission must be type accepted. 47 C.F.R. § 90.203(a). The petition proposes to permit law enforcement agencies to operate non-type accepted transmitters without a license but would hold the agencies reponsible for any interference complaints. To allow non-type accepted transmitter equipment to operate on an unauthorized basis, even if such transmitters adhere to Petitioner's technical limitations, invites potential interference problems that do not advance the public interest.

V. CONCLUSION

12. In sum, Petitioner has not established sufficient reasons to pursue a rule making proceeding to exempt certain low power devices used by law enforcement agencies from our equipment authorization and licensing rules. Properly authorized low power devices currently are available to law enforcement agencies for their licensed use. We will continue to require Part 15 and Part 90 devices to obtain the appropriate equipment authorization. We remain committed to preserving the integrity of our equipment authorization program and to protecting against the potential of harmful interference.

13. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 0.241, 0.331, 1.401(e), and 1.407 of the Commission's Rules, 47 C.F.R. §§ 0.241, 0.331, 1.401(e), and 1.407, and Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), that the Petition for Rule Making filed by Brown and Schwaninger IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer,
Office of Engineering and Technology

FOOTNOTES

[1] Petition for Rule Making, RM-7335, *Public Notice*, Report No. 1814 (April 4, 1990) (*Petition*).

[2] *Petition* at 1-2. Petitioner also states, without substantiation, that defense attorneys have been able to dismiss police evidence obtained through the use of non-FCC authorized devices as violative of the Fourth Amendment's protection against illegal

search and seizure. Petitioner concludes that if an exemption for low power devices for police agencies is not granted, "the Commission will unintentionally continue to assist defense attorneys' use of this tactic."

[3] Petitioner suggests these limits: (1) any sale must be limited to law enforcement agencies; (2) no more than 10 devices can operate on the same frequency; (3) power output is limited to 120 milliwatts; (4) equipment must be limited to mobile use; (5) no operation is permitted on the restricted bands in 47 C.F.R. § 15.205; (6) the seller must keep records of the purchasing agencies' statement of use regarding the device; (7) the manufacturer must identify each unit of equipment; (8) the supplier must take precautions in design and construction to reduce the likelihood of interference, and; (9) the equipment shall not be designed to interconnect with the public switched telephone network. The equipment seller also would be required to maintain sufficient records to demonstrate that the various manufacturing conditions and sales to law enforcement agencies were met. *Petition* at 7-9.

[4] Submitting comments were Associated Public-Safety Communications Officers, Inc. (APCO), Audio Intelligence Devices (AID-Fort Lauderdale Office and separately, AID-Mid-Atlantic Northeast Regional Office), Brown and Schwaninger, California Public-Safety Radio Assocation, Inc. (CPRA), HDS, Inc. (HDS), the National Technical Investigators Association (NATIA), and Sheriff Tom Purvis of Mobile County, Alabama. Reply comments were filed by Brown and Schwaninger.

[5] Comments of AID-Fort Lauderdale at 2.

[6] Comments of AID-Mid-Atlantic at 3.

[7] Comments of APCO at 2; *see* Comments of CPRA at 1-2.

[8] Comments of HDS at 7.

[9] Comments of NATIA at 3-5.

[10] Comments of Sheriff Tom Purvis of Mobile County, Alabama at 2.

[11] *See Report and Order*, Docket No. 18426, 23 FCC 2d 79 (1970) (implementing rules to direct equipment authorization standards at manufacturers, vendors, and shippers of radio frequency devices).

[12] *See* 47 C.F.R. § 2.909. While the user's operation of a device may be the direct cause of any interference, the technical parameters designed and incorporated into the equipment by manufacturers are the origin of, or establish the potential for, interference problems. Exemption of equipment authorization would disassociate manufacturers from responsibility for limiting interference potential of radiating devices.

[13] Comments of Brown and Schwaninger at 5.

[14] Part 15 of the Rules permits the non-licensed use of devices with relatively low power. To allow non-licensed use at higher power levels, like the proposed 120 milliwatts, could result in harmful interference to other communications users. Requirements to coordinate frequencies and license transmitters using such powers generally avoids interference problems.

[15] Comments of Brown and Schwaninger at 2-3. While we cannot speak to the admissability of evidence obtained by the use of non-FCC authorized equipment into courts, we hold manufacturers, importers, sellers, and users of such RF equipment responsible for compliance with applicable Commission Rules.

[16] Comments of CPRA at 2; HDS at 4-5; NATIA at 4. AID states that its company offers over forty surveillance transmitters, including type accepted, low power transmitters. Comments of AID-Mid-Atlantic at 3-4. The Commission's Office of Engineering and Technology publishes a list of equipment acceptable for licensing in a compilation entitled "Radio Equipment List."

[17] Comments of AID-Mid-Atlantic at 3; HDS at 4; NATIA at 3.

[18] *See* Comments of AID-Fort Lauderdale at 1-2; AID-Mid-Atlantic at 3; NATIA at 3-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-146

In re Applications of

Roy William Mayhugh (hereafter "Mayhugh")	File No. BPH-891228MF
David A. and Mary Ann Digerness (hereafter "Digerness")	File No. BPH-891228MI
Janice D. and Jonathan Levin (hereafter "Levin")	File No. BPH-891228ML

For Construction Permit
for a New FM Station on
Channel 227B in Big Pine, California

HEARING DESIGNATION ORDER

Adopted: May 15, 1991; Released: June 10, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Levin.* In its April 19, 1990 engineering amendment to change transmitter sites, Levin submitted a proposed change in its effective radiated power (ERP) (Section V-B, Item 9) from 50 kw to 830 kw. The latter figure should read .830 kw. The engineering narrative specifies an ERP of 0.830 kW. The staff has verified this ERP given the antenna heights above average terrain and the distances to the 3.16 mv/m & 1 mv/m contours of the cardinal radials listed in the corresponding table in Section V-B. Since we can confidently and reliably, drawing on the application as a whole, determine that the defect is a typographical error, this is neither a tenderability nor an acceptability defect, and Levin will be allowed to amend its application. To remedy this deficiency, Levin must submit a corrective amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Levin shall submit an amendment to the presiding Administrative Law Judge containing the information required in Section V-B, Item 9 concerning its ERP.

6. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, DC 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, DC 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 7, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON WOODHULL COMMUNITY TELEPHONE COMPANY PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On May 1, 1991, the Woodhull Community Telephone Company (Woodhull) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. Woodhull requests an additional nine months to complete the conversion of its end offices to equal access. According to Woodhull, in March 1988, MCI Telecommunications Corporation (MCI) requested that Woodhull convert its end offices to equal access. Pursuant to Commission order, Woodhull is required to complete the equal access conversion of end offices equipped with stored program controlled (SPC) switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). The three-year time period ended in March 1991. Woodhull seeks an additional nine months, until January 1, 1992, to complete its equal access conversion.

Woodhull states that it was not aware of MCI's request until April 1991, when MCI contacted Woodhull to ascertain the progress of Woodhull's equal access conversion. Woodhull believes that it may have overlooked the MCI letter because it was in the process of installing a new DMS-10 Northern Telcom switch during 1988. Woodhull states that the new switch does not have equal access capability, and it will take about seven months to upgrade the switch. Woodhull states that, had it been aware of MCI's request, Woodhull would have implemented equal access at the time the switch was installed to avoid additional costs and time. Woodhull adds that MCI does not oppose the proposed new conversion date.

Interested parties should file comments on the petition by **June 28, 1991,** and reply comments by **July 8, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, DC 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554; and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, DC 20037. Copies of the petitions can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. § § 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-90-22

GTE CALIFORNIA, INC.,
GTE FLORIDA, INC.,
GTE HAWAIIAN TELEPHONE CO., INC.,
GTE NORTH, INC., GTE SOUTH, INC.,
and GTE SOUTHWEST, INC.,
Defendants.

ORDER

Adopted: May 31, 1991; Released: June 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaint alleging that defendants' rates for 1988 were unjust and unreasonable in violation of 47 U.S.C. § 201(b). AT&T maintained defendants had overstated their interstate revenue requirements. On May 22, 1991, the parties filed a joint motion to dismiss the complaint with prejudice. The parties state that all claims in the action have been compromised and settled between the parties, with defendants admitting no liability.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc.
Petition for Limited Waiver of
Network Disclosure Requirements

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1991; Released: June 3, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this order we grant the petition filed by US West Communication, Inc. (US West) for a limited waiver of the Commission's notification period for network disclosure (Petition). US West requests the waiver in order to provide a new video transport service to the Federal Aviation Administration (FAA) for the Special Olympics in July 1991. The special circumstances set forth in US West's petition establish good cause for approval of the waiver.[1]

II. BACKGROUND

2. The Commission requires the Bell Operating Companies (BOCs) to comply with certain network disclosure requirements to help ensure that telecommunications manufacturers, vendors, and providers can obtain, on a nondiscriminatory basis, technical and marketing information about any new or modified network interfaces or services affecting interconnection to the network. *Computer II* [2] required each BOC to disclose network information at the time it is provided to its separate subsidiary. The BOCs were also required to disclose network technical and market information derived from joint research and development by their network service providers and separate subsidiaries at the make/buy point. The make/buy point is the time at which the BOC decides to make itself, or procure from an unaffiliated company, any product the design of which affects or relies on the network interface.[3]

3. The *BOC CPE Relief Order* requires that the BOCs either: 1) certify that they will not engage in customer premises equipment (CPE) research, development, or design, and will follow the *Computer II* network disclosure rules;[4] or 2) notify the CPE industry that a new or modified network service is under development at the make/buy point, and provide technical and market information relating to the new product or modified network service to the public twelve months before the service is introduced. When the make/buy point occurs less than twelve months before the service can be introduced, public disclosure must occur at the make/buy point, but not less than six months before the introduction of the service.[5] Similar network disclosure rules were required in *Computer III* for changes in BOC networks or new network services that affect the interconnection of enhanced services with the network.[6] Finally, all carriers are subject to network disclosure requirements of Section 68.110 (a) and (b) of the Commission's rules.[7] Pursuant to this section, all carriers must disclose network information to the public at a time reasonably before the implementation of a new or modified network service.

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[1] *See* 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (DC Cir. 1969).

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations *(Computer II)*, 77 FCC 2d 384 (1980), *modified on recon.*, 84 FCC 2d 50 (1981) *(Reconsideration Order)*, *modified on recon.*, 88 FCC 2d 512 (1981) *(Computer II Further Reconsideration Order)*, *affirmed sub nom.*, Computer and Communications Industry Association v. FCC, 693 F. 2d 198 (DC Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[3] C.F.R. § 64.702(d)(2); Computer and Business Equipment Manufacturers Association Petition for Declaratory Ruling Regarding Section 64.702(d)(2) of the Commission's Rules and Policies of the Second Computer Inquiry, 93 FCC 2d 1226, 1238, 1244-5 (1983) *(Disclosure Order)* at para. 36, 58-9; Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117, 1140 (1983) *(BOC Separation Order)* at para. 60.

[4] *Computer II Reconsideration Order*, 84 FCC 2d at 82, para. 95; Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143, 151 (1987) *(BOC CPE Relief Order)*, *recon.*, 3 FCC Rcd 22 (1987).

[5] *BOC CPE Relief Order*, 2 FCC Rcd at 151, paras. 53-4 & n. 132 .

[6] Amendment of Sections 64.702 of the Commission's Rules and Regulations *(Computer III)*, CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) *(Phase I Order)*, *recon.*, 2 FCC Rcd 3035 (1987) *(Phase I Reconsideration Order)*, *further recon.*, 3 FCC Rcd 1135 (1988) *(Phase I Further Reconsideration Order)*, *second further reconsideration*, 4 FCC Rcd 5927 (1989) *(Phase I Second Further Reconsideration)*, *Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990) *(California)*, *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (DC Cir. pet. for rev. filed May 16, 1988); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072, 3087-88 (1987) *(Phase II Order)*, *recon.*, 3 FCC Rcd 1150 (1988) *(Phase II Reconsideration Order)*, *further recon.*, 4 FCC Rcd 5927 (1989) *(Phase II Further Reconsideration)* , *Phase II Order vacated sub nom.* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990) *(California)*, *pets. for rev. pending sub nom.* BellSouth Corp. v. FCC, No. 88-7290 (9th Cir. docketed July 29, 1988). *See also* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 252, para. 489 (1988) *(BOC ONA Order)*, *recon.*, 5 FCC Rcd 3084 (1990) *(BOC ONA Reconsideration Order)*, *pets. for rev. pending;* 5 FCC Rcd 3103 (1990) *(BOC Amended Plans Order)* . The Ninth Circuit's vacation of the *Computer III* decision has generally returned the industry to a *Computer II* regime. The Commission issued a limited interim waiver to allow the BOCs to continue offering enhanced services on an integrated basis pursuant to approved Comparably Efficient Interconnection (CEI) plans. Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 174, 183 (1991).

[7] 47 C.F.R. § 68.110 (a) and (b).

III. PETITION

4. US West states that the FAA has requested specialized video transport service between two airports in Minnesota, the Minneapolis/St. Paul International Airport and the St. Paul Downtown Airport, in order to respond to unique air traffic demands associated with the Special Olympic Games scheduled to begin July 17, 1991. The FAA requested that this service be available by June 1, 1991 to provide sufficient time for the FAA to test its system and train air traffic controllers to use the system. US West states that without the requested video transport service, the FAA's ability to coordinate air traffic control between the two airports will be restricted.

5. US West states that in order to provide the requested service to the FAA, US West has had to develop a new network interface. US West states that no CPE or enhanced services will be associated with the service, and that the requested service is a stand-alone video transport service. US West states that, although it disclosed the new network interface specifications for the video transport service on May 6, 1991, it will be unable to comply with Commission rules that require public disclosure of such new network interface six months before the service utilizing that interface is introduced, because the FAA must have the video transport service by June 1, 1991.

6. US West argues that a waiver of the six month period for notification in this situation will neither violate the spirit of the network disclosure rules, nor advantage US West. US West indicates that although it has not certified that it will not engage in CPE research, development, or design, it has not designed or manufactured CPE which connects to the video service interface. US West also states that it will not provide the FAA with CPE in conjunction with the video service, and will not sell, lease, or give any customer CPE with this service before the six month period expires. US West states that its *Computer II* separate subsidiary has not received any notice other than that given to the public, and that no services will be affected by the notice requirement waiver, nor will any other party be disadvantaged. Therefore, US West argues, the waiver is in the public interest and there is good cause to waive the minimum six month notice period requirement.

IV. DISCUSSION

7. We find that granting US West's petition for a limited waiver of all applicable network disclosure rules is in the public interest. No party has objected to the waiver request, and US West has set forth special circumstances, as described above, that justify the waiver. For instance, US West states that the new interface was developed specifically to respond to the FAA's need for specialized video transport service, and that, without a waiver of the network disclosure requirements, it could not provide the requested video service to the FAA in a timely manner. The Independent Data Communications Manufacturers Association, Inc. states that, although it does not oppose the waiver request, any waiver should be narrowly drawn in order to preserve the effectiveness of the network disclosure rules.[8]

8. We find that a limited waiver is necessary to achieve the substantial public interest benefits deriving from an expanded air traffic control capability during the Special Olympics. We conclude that a limited waiver in these circumstances will not undermine the Commission's network disclosure rules, and will significantly enhance public safety. Accordingly, we grant US West's request for a limited waiver of the network disclosure rules to provide the FAA with video transport service in Minnesota beginning June 1, 1991, for the Special Olympics to be held in July 1991.

V. ORDERING CLAUSE

9. Accordingly, IT IS HEREBY ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R § § 0.91 and 0.291, US West's Petition for Waiver IS GRANTED, as described herein.

10. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[8] Letter from James L. Casserly, to Chief, Common Carrier Bureau, dated May 17, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Bell Atlantic Telephone Companies' Request for Waiver to Offer Coin Message Delivery Service

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1991; Released: June 4, 1991

By the Deputy Chief, Common Carrier Bureau

I. INTRODUCTION

1. On February 12, 1991, Bell Atlantic filed a petition for waiver of the *Computer II* [1] rules to offer coin message delivery service (CMDS) on an integrated basis. CMDS is a voice messaging service for users of pay telephones. A Bell Operating Company (BOC) that wishes to offer on an integrated basis an enhanced service that is not the subject of a previously approved Comparably Efficient Interconnection (CEI) plan must receive a waiver of the Commission's *Computer II* requirements. [2] In this Order, we find that Bell Atlantic has met the standard for *Computer II* waivers and grant the requested waiver. [3]

II. THE PLEADINGS

2. Bell Atlantic describes its coin message delivery service as a voice messaging service for users of public coin telephones that allows callers to deliver a message to a person whose telephone is busy or not answered. With CMDS, if a caller receives a busy signal or no answer, the caller may deposit coins to activate a call delivery network. The caller then records a message that a voice messaging processor will attempt to deliver to the intended recipient. The processor redials the intended recipient's number repeatedly until either the telephone is answered or the designated period of time expires. Bell Atlantic estimates that in its region alone, three hundred million coin calls were uncompleted last year. Bell Atlantic states that CMDS would permit completion of tens of millions of these calls.[4]

3. Bell Atlantic argues that we should find that CMDS can be offered under its approved CEI plan for voice messaging. In the alternative, Bell Atlantic requests a waiver of the *Computer II* rules to permit it to offer CMDS, and states that it will provide the service in a manner consistent with the CEI requirements.[5] Bell Atlantic states that it is economically efficient to provide CMDS using the same equipment used for other voice messaging services, which is located in telephone company central offices. Bell Atlantic states that if the Commission required CMDS to operate through a separate subsidiary, Bell Atlantic would be forced to purchase dedicated voice messaging equipment at a cost of $5.8 million, a 70 percent increase over the equipment cost in a shared use environment. Bell Atlantic argues that the additional costs that would be incurred by providing CMDS on a separated basis would increase the price of CMDS beyond the price consumers are willing to pay.[6]

4. In support of Bell Atlantic's petition, MessagePhone states that CMDS addresses the needs of pay telephone callers who do not have the ability to use the telephone at fifteen-minute intervals and that services similar to CMDS are not being offered at present by any other enhanced service provider. MessagePhone also states that the availability of destination services such as answering machines and call waiting has not substantially reduced the number of unanswered calls made from pay telephones.[7] Unisys, the equipment vendor for CMDS, states that a delay in implementing CMDS will impede coordination of the cooperative efforts of all companies involved, including component manufacturers and software suppliers, and may result in the shifting of resources to other productive efforts.[8] The DC PSC opposes Bell Atlantic's petition, arguing that CMDS was not a part of the approved CEI plan for voice messaging services and that Bell Atlantic has failed to meet the waiver standard.[9] APCC asserts that Bell Atlantic has not outlined clearly the manner in which it will offer underlying basic services to competitors.

III. DISCUSSION

5. Under *Computer II*, a BOC must offer enhanced services on a fully separated basis or obtain a waiver of the Commission's rules. Under *Computer III*, [10] the Commission permitted the BOCs to offer enhanced services on an integrated basis, prior to the implementation of Open Network Architecture, pursuant to approved CEI plans. The vacation of certain *Computer III* decisions generally returned the industry and the Commission to a *Computer II* regime. However, the Commission waived the *Computer II* rules to permit the BOCs to offer enhanced services on

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations *Computer II*), 77 FCC 2d 384 (1980) *(Final Decision), mod'd on recon.*, 84 FCC 2d 50 (1981) *(Computer II Reconsideration Order), mod'd on further recon.*, 88 FCC 2d 512 (1981) *(Computer II Further Reconsideration Order), aff'd sub nom.* Computer and Communications Industry Association v. FCC, 693 F. 2d 198 DC Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[2] *See* Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier I Local Exchange Company Safeguards, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 174, 191, n. 135 (1990) *(BOC Safeguards Notice)*.

[3] Comments were filed by MessagePhone, Inc. and the Public Service Commission of the District of Columbia (DC PSC). Reply comments were filed by Bell Atlantic, the American Public Communications Council (APCC), MessagePhone, and the Unisys Corporation. Bell Atlantic also filed a letter clarifying certain aspects of its petition for waiver.

[4] Bell Atlantic Petition at 2, 4-5.

[5] Bell Atlantic Petition at 1-4.

[6] Letter from Marie Stasiorowski to Donna Searcy (May 28, 1991).

[7] MessagePhone Comments at 2, 5.

[8] Unisys Reply Comments at 2.

[9] DC PSC Comments at 4.

[10] Amendment of Sections 64.702 of the Commission's Rules

an integrated basis, provided that the services were included in an approved CEI plan, and recognized that the BOCs could request waivers of *Computer II* for individual services.[11]

6. We find that CMDS was not included in Bell Atlantic's approved CEI plan for voice messaging services, as the service description included voice messaging services provided to residential users, but not services provided to users of pay telephones.[12] Therefore, Bell Atlantic must independently justify a waiver of the *Computer II* rules for CMDS.

7. The Commission recognized that the public interest might be served by waivers of the *Computer II* rules under certain circumstances.

> [W]e recognize that adherence to such structural separation may foreclose the availability to consumers of certain enhanced services if, for example, state of the art technology dictates that only through the use of network facilities could the carrier provide a given enhanced service, or if complying with the separate subsidiary requirements results in the imposition of unreasonable costs upon consumers. Should such situations arise we are prepared to assess the merits of granting a waiver of our separation requirement for a specific service ....[13]

8. We conclude that Bell Atlantic has made the necessary showing for a waiver of the *Computer II* rules for the provision of CMDS. Bell Atlantic has demonstrated that CMDS provides an important service to customers, and that no other enhanced service provider currently offers CMDS or a similar service for pay telephones.[14] In light of the large number of uncompleted pay telephone calls, we conclude that the record demonstrates that CMDS would be valuable to consumers. Bell Atlantic has also shown that offering CMDS on a separated basis is not a viable option, because the cost of purchasing the requisite CMDS equipment and complying with other separate subsidiary requirements would push the price of a CMDS call beyond the amount that most consumers would be prepared to pay. [15] Thus we believe that a waiver is necessary to ensure that CMDS is available to customers at a reasonable price. We note that Bell Atlantic states that it will provide CMDS consistent with the CEI requirements and condition our grant of this waiver upon Bell Atlantic's compliance with all of the CEI requirements. We believe that this condition addresses APCC's concerns by requiring that Bell Atlantic provide the underlying basic services to its competitors on a non-discriminatory basis. The waiver we grant today is, of course, subject to the Commission's decision in the *BOC Safeguards* proceeding.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, Bell Atlantic's Petition for Waiver of the *Computer II* rules for the provision of Coin Messaging Delivery Service IS GRANTED to the extent described herein and is otherwise DENIED.

10. Accordingly, IT IS FURTHER ORDERED that this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

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and Regulations *(Computer III)*, CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) *(Phase I Order)*, *recon.*, 2 FCC Rcd 3035 (1987) *(Phase I Reconsideration Order)*, *further recon.*, 3 FCC Rcd 1135 (1988) *(Phase I Further Reconsideration Order)*, *second further recon.*, 4 FCC Rcd 5927 (1989) *(Phase I Second Further Reconsideration Order)*, *Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990), *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (DC Cir. pet. for rev. filed May 16, 1988); Phase II, 2 FCC Rcd 3072 (1987) *(Phase II Order)*, *recon.*, 3 FCC Rcd 1150 (1988) *(Phase II Reconsideration Order)*, *further recon.*, 4 FCC Rcd 5927 (1989) *(Phase II Further Reconsideration Order)*, *Phase II Order vacated sub nom.* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990), *appeal pending sub nom.* California v FCC, No. 88-7183 (9th Cir. pet. for rev. filed May 13, 1988).

[11] *BOC Safeguards Notice*, 6 FCC Rcd at n. 135.

[12] *See* Offer of Comparably Efficient Interconnection to Providers of Voice Messaging Services, Memorandum Opinion and Order, 3 FCC Rcd 5772 (Com. Car. Bur. 1988).

[13] *Computer II*, 84 FCC 2d at 57, para. 19.

[14] The record indicates that while message delivery services are being offered by some operator service providers, these services cannot be used for local "coin-paid" pay telephone calls. MessagePhone Comments at 2.

[15] Letter from Marie Stasiorowski to Donna Searcy, May 28, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FORT MOJAVE INDIAN TRIBE,
Complainant,

v. File No. E-90-85

CITIZENS UTILITIES COMPANY,
Defendant.

ORDER

Adopted: May 31, 1991; Released: June 10, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 30, 1989, the Fort Mojave Indian Tribe (hereinafter "FMIT") filed with the Commission the above-captioned formal complaint against Citizens Utilities Company (hereinafter "Citizens") alleging that Citizens violated Section 201(b) of the Communications Act, 47 C.F.R. § 201(b), by its refusal to interconnect FMIT's local exchange company with the public switched telephone toll network on reasonable terms and conditions. Citizens denied the allegations and moved to dismiss the complaint.

2. After extensive briefing of the legal and factual issues involved, the parties, with the encouragement and participation of the Enforcement Division, entered into negotiations aimed at resolving their dispute. On May 28, 1991, the parties filed a joint motion seeking dismissal of the complaint with prejudice, stating that a mutually agreeable settlement of all pending controversies has been reached. We have reviewed the parties' joint motion and are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-264

In the Matter of

Proposals to Reform the
Commission's Comparative
Hearing Process to Expedite
the Resolution of Cases

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1991; Released: May 15, 1991

By the Commission: Commissioner Barrett issuing a separate statement.

1. By this *Memorandum Opinion and Order*, the Commission provides clarification of and certain procedural adjustments to the *Report and Order* in this proceeding, reflecting the Commission's efforts to reduce substantially the time consumed in the conduct of comparative hearings and agency review in cases involving applicants for new broadcast facilities. 56 Fed. Reg. 787 (January 9, 1991); 6 FCC Rcd 157. Petitions for reconsideration of that action were filed by: the Federal Communications Bar Association (FCBA); Timothy K. Brady, *et al.* (Brady); Black Citizens for a Fair Media, *et al.* (BCFM); and the National Association for the Advancement of Colored People, *et al.* (NAACP).[1]

The FCBA and Brady Petitions

Hearing Fees

2. The FCBA requests clarification with regard to the Public Notice that will trigger the payment of the hearing fee before an application is designated for hearing. In response to that request, the following clarification is provided.

3. The hearing fee payments will be triggered by the Public Notice announcing the acceptance of an application for filing. That Public Notice will also specify a date for the payment of the hearing fee. Once paid, a refund of the hearing fee will be available to an applicant, upon request, whenever: (1) the applicant is dismissed, voluntarily or involuntarily, before an HDO is issued; (2) the applicant is granted without being designated for a comparative hearing; or (3) the applicant that has been designated for hearing meets the criteria set forth in section 1.1111(c) of our rules. 47 C.F.R. § 1.1111(c).

4. As indicated in the *Report and Order*, all commercial broadcast applications that have not been the subject of such a Public Notice released prior to July 1, 1991 (the effective date of the rule change), must pay the hearing fee on a date established in the Public Notice announcing the acceptance of the application for filing. All commercial broadcast applications that have been the subject of such a Public Notice released prior to July 1, 1991, will be required to pay their hearing fee by July 15, 1991, unless such applications are designated for hearing before that date. All applicants designated for hearing before July 15, 1991, should pay their hearing fee with their Notices of Appearance. Appendix A hereto specifies the procedures for payment of the hearing fee by applicants that were accepted for filing before the effective date of this rule change. We wish to emphasize that this hearing fee payment requirement also applies to renewal applicants that face a comparative challenge.[2]

The Ruarch Policy

5. The *Report and Order* limited the ability of a successful applicant to "withdraw" divestiture and integration proposals under the *Ruarch* policy to cases in which a "global" settlement was entered into and filed with the presiding judge on or before the notice of appearance deadline. The FCBA suggests that a later date, after the completion of discovery, would be more appropriate. The FCBA notes that discovery is often necessary for the parties to make a comparative assessment of the applications and determine whether a settlement is worthwhile.

6. Recognizing that discovery often aids the settlement process, we will apply the *Ruarch* policy and permit applicants to withdraw divestiture and integration proposals in conjunction with settlement agreements filed up until the date established for the exchange of exhibits in the case, that is, after the completion of discovery in the case. After the exhibit exchange date, the successful applicant will be expected to fulfill its divestiture and integration proposals.

Discovery

7. The FCBA and Brady offer a number of suggestions to fine tune the revised discovery procedures. The *Report and Order* determined that discovery should be commenced by the exchange of documents on the notice of appearance deadline pursuant to a standardized document production order. A standardized integration statement would be exchanged on the same date. Parties could request additional relevant documents, not called for in the standardized production order, at any time after the issuance of the HDO, but initial supplemental requests for documents were to be filed no later than ten days after the notice of appearance deadline. Oral depositions would follow, and all applicants were to be prepared to make their active and passive owners available for such depositions, to be be held in Washington, D.C. or in the proposed community of license, at the deponents' option, unless all parties agree to some other location. The 21-day notice provision for depositions would not apply to depositions of these applicant principals.

8. The FCBA suggests that the initial exchange of documents and integration statements be delayed until a date five days after the notice of appearance deadline. We agree that a five-day delay would permit applicants to avoid the burden and costs of serving materials on applicants that no longer wish to participate in the case, and we will amend our rules accordingly.[3] The FCBA also seeks clarification of the requirement to submit "initial" supplemental document requests within ten days of the first document exchange. That requirement is intended to expedite requests for additional relevant documents that were not covered in the categories of the standardized

document production order or are revealed in the materials exchanged pursuant to that order or in the standardized integration statement. The failure to request such documents within the ten-day period would not foreclose an applicant's right to request other documents identified in future discovery, including depositions.

9. With regard to the conduct of depositions, the FCBA suggests that we reinstate the 21-day notice rule for depositions of an applicant's principals.[4] Brady suggests that we should further limit the location of depositions, requiring them to be held in the community of license of the proposed station, unless the parties agree to some other location. According to Brady, eliminating the deponent's option to be deposed in Washington, D.C. will save time and money. Petitioner opines that most principals live in or near the proposed community of license; all depositions can be taken at the same time and place, and principals can attend all deposition sessions. On the other hand, Brady alleges that the Washington, D.C. option provides an economic benefit to attorneys in Washington, at the expense of applicants as well as attorneys headquartered elsewhere. In Brady's opinion, the interests of expedition are not served by permitting deponents the option to be deposed in Washington.

10. Under our new discovery rules, an applicant's principals are on notice that they may be called for depositions during the period commencing with the initial document exchange and ending 90 days after the release of the designation order. In these circumstances, requiring an additional 21-days' advance notice of the depositions of principals would needlessly delay the proceedings. We believe that, within the period provided for depositions, the applicants and their attorneys will be able to work out reasonable schedules for the conduct of depositions of principals.

11. Nor do we believe that limiting the deponent's option to select the deposition location would facilitate discovery. Our purpose in creating the option is to eliminate, to the extent possible, disputes over the location of deposition sessions. Whether sessions are held in Washington, D.C. or the proposed community of license, someone will have to travel to the session. In some cases it may be more convenient to the applicant to have the deponents travel to Washington, D.C. than to have the attorneys travel to the proposed community. In other situations, the opposite may be case. We agree with Brady that bringing all principals and attorneys together in one place for deposition sessions may have a salutory effect on the settlement process, but we do not believe that we should mandate such collective deposition sessions by limiting the deponent's option to the proposed community of license.

12. In order to facilitate discovery on new issues added to a proceeding in response to petitions to enlarge issues, we amended section 1.229 of our rules to require that a motion to enlarge identify those documents the moving party wishes to have produced and any other discovery procedures the movant wishes to employ. The FCBA asks us to make it clear that the moving party is not foreclosed from supplementing that discovery request on the basis of the opposing party's responsive pleading or information developed during the discovery on the enlarged issue. Such supplemental requests are not foreclosed, although any such requests are subject ultimately to control by the presiding judge.

Written Cases

13. The *Report and Order* amended section 1.248 of our rules to make it clear that ALJs should permit oral testimony and cross examination only where material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings. The FCBA suggests that the application of this new rule will engender litigation over the need for oral testimony and thereby waste, rather than save, time.

14. Although there may be cases that involve disputes over the need for a witness's testimony, we believe that, overall, more time will be saved by reasonable limitations on oral testimony than would be lost in the resolution of such disputes. In this regard, we note that a determination of whether a witness's testimony is needed resides in the exercise of the presiding judge's sound discretion. Nor do we agree with FCBA's contention that limitations on cross examination will reduce the number of cases in which dishonest applications are exposed or that parties will be forced to reveal strategies in their requests for witnesses. The discovery process provides ample opportunity to test an applicant's *bona fides*, and in most cases, it will be material uncovered during discovery that raises a legitimate expectation that some part of a witness's direct testimony, as reflected in exhibits, is subject to a question of substantial decisional significance.

Pleading Cycles and Page Limitations

15. The FCBA reiterates its request for 60 days within which to file proposed findings in broadcast comparative hearing cases, suggesting that the 45 days provided for in the *Report and Order* is inadequate to prepare meaningful findings that would be of assistance to the ALJ in preparing the Initial Decision.[5] Petitioner also asserts that adhering to the 25 page limit for exceptions to initial decisions will be very difficult, particularly in cases involving numerous parties and given the 30-day period in which exceptions must be filed.

16. We continue to believe that in the routine case, proposed findings can reasonably be prepared within the 45-day time guideline. However, it was not our intention to circumscribe the exercise of an ALJ's discretion to set longer time limits, particularly in cases involving numerous parties and complex questions of fact and/or law. Similarly, we believe that the 25 page limit is reasonable for exceptions to initial decisions, but the Review Board may grant waivers of that limit, particularly in complex cases.

Forfeiture Authority

17. The *Report and Order* gave ALJs the authority to impose forfeitures up to the maximum amount permitted by statute. *See* 47 U.S.C. § 503(b)(2)(A) ($25,000 for each violation to a maximum of $250,000 for continuing violations). The FCBA argues that forfeitures for serious misconduct should be applied pursuant to a uniform policy so that applicants are not assessed different forfeitures for essentially the same misconduct. Petitioner also asserts that the assessment of forfeitures by an ALJ are likely to engender agency and judicial appeals, thereby delaying the final resolution of a case. In the alternative, the FCBA suggests that matters involving potential forfeitures should be referred to the Mass Media Bureau for possible commencement of separate forfeiture proceedings.

18. We are confident that ALJs, utilizing decisions in other forfeiture cases, will exercise this authority equitably, and any party that believes it has been treated unfairly can avail itself of review procedures. Moreover, the appeal of a forfeiture decision alone is unlikely to delay the final resolution of a licensing case. Where the only issue on review is the forfeiture, we intend that the grant of the construction permit in the case would become final, and the successful applicant could proceed with the construction of the station. With regard to the FCBA's alternative forfeiture procedure, we note that the conduct underlying the potential forfeiture would also be relevant to the question of which application should be granted. In these circumstances, we believe that the presiding judge is in the best position to make a determination on the underlying misconduct and assess a forfeiture, if appropriate.

19. However, we are concerned that applicants not be able to escape possible forfeiture liability by simply dismissing their applications, by settlement or otherwise, before the ALJ has rendered a decision on the forfeiture. Thus, where an applicant subject to a potential forfeiture is dismissed, the Commission will determine whether a forfeiture is appropriate in light of the alleged misconduct, and we are amending section 1.80 of our rules to provide that any order dismissing an applicant facing a potential forfeiture will be forwarded to the Commission for possible action. 47 C.F.R. §§ 1.80. Under section 1.117, the Commission will have 40 days to determine whether it should pursue the forfeiture. 47 C.F.R. § 1.117.[6]

Questions Relating to Proceedings in Progress

20. The FCBA raises a number of questions on how the new procedures will be applied to proceedings in progress. Generally, upon the effective date of these changes, HDOs will direct the applicants to exchange documents and integration information in accordance with the standardized document production and integration rules. Such cases would then progress under the procedures adopted in this proceeding.

21. In the cases designated for hearing before the effective date of these changes, the timing of discovery and the setting of other procedural dates are under the control of presiding judges. In appropriate cases, the presiding judge may require an exchange of the categories of documents described in the Standardized Document Production Order and/or an exchange of integration proposals in the same form as the Standardized Integration Statement. Similarly, where procedural dates have been established by the presiding judge before the effective date of these changes, the ALJ has the discretion to revisit that decision and set new dates. Any such decisions should be made in the light of the time savings that may be accomplished as a result of rule changes which expedite the discovery process. We are confident that, in the exercise of their discretion, ALJs will not permit such cases to languish on a "slow track" while subsequently designated cases are expedited by the application of these procedures.[7]

The BCFM Petition

22. BCFM seeks clarification of the requirement in the new section 73.1620(g) that certain reports must be filed by applicants "granted as a result of a settlement or other decision in a comparative hearing." The petitioner believes that the reporting requirement should be applicable to the successful applicant whenever the grant is a result of a decision on the comparative merits of the applicants, a settlement, or the other applicants are simply dismissed. BCFM argues that an applicant's comparative promises are factors that are likely to influence a competitor's decision to prosecute its application, seek a settlement, or abandon or otherwise seek dismissal of its application. The petitioner also asks that the one-year holding period relating to the transfer or assignment of construction permits and/or licenses be applied in a similar fashion. *See* 47 C.F.R. § 73.3597(a)(1).

23. It was not our intention to apply the reporting requirements of section 73.1620(g) to applicants granted after designation for a comparative hearing where the competing applications are abandoned through inaction or voluntary dismissal. The reporting requirement was adopted to ensure that applicants fulfill comparative promises that were either relied upon by the Commission in deciding the case or taken into consideration by competitors in post-designation settlements. In this regard, our experience indicates an applicant's decision simply to abandon its application normally is influenced by factors that bear no relation to a competitor's comparative promises. We shall therefore require reports only from applicants that were granted after consideration of their comparative merits in a hearing or pursuant to post-designation settlements. Having determined that section 73.1620(g) should not be amended to read as suggested by BCFM, the petitioner's assertion that section 73.3597 be similarly amended is moot.[8] However, we will amend section 73.1620(g) to make it clear that reports are not required from applicants unless their grant was the result of a post-designation settlement or a decision favoring them after comparative consideration of mutually exclusive applicants.[9]

The NAACP Petition

24. The *Report and Order* noted that certain suggestions offered by the NAACP dealing with comparative evaluation factors were beyond the scope of this proceeding. Petitioner argues that its proposals were within the scope of our invitation to commenters to submit "other proposals designed to achieve [expedition in the resolution of comparative broadcast proceedings]." *Proposals to Reform the Comparative Hearing Process to Expedite the Resolution of Cases (NPRM)*, 5 FCC Rcd 4050, 4055 (1990). In the alternative, the NAACP asks that its filing be treated as a petition for Rule Making.

25. In comments on the NAACP petition, Rochlis requests that we establish a "pioneer's preference" in FM comparative proceedings. The preference would be available to the applicant that successfully petitioned for rule making to add the channel to the FM Table of Allotments. *See* 47 C.F.R. § 202. Rochlis suggests that the preference should be equal to twice the weight presently assigned to the full-time integration of 100 percent of an applicant's owners. In petitioner's view, the fact that a party took the initiative and expended the time and money to petition for the new channel reflects its willingness and ability to serve the community. Rochlis also alleges that, although the suggested preference would not be dispositive of all cases, it would serve to reduce the number of applicants that file against the "pioneer," thereby expediting the provision of a new service to the commu-

nity. Petitioner contends that the preference should be applicable to all cases that have not, as yet, been designated for hearing.

26. This proceeding is not intended to focus on the criteria by which the Commission makes comparative evaluations between mutually exclusive broadcast applicants. Rather, it is concerned with the process by which facts relevant to those criteria are brought before the Commission for decision with the goal of expediting those decisions. Both the NAACP and Rochlis assert that their proposed changes to the comparative criteria would expedite the resolution of cases, and both parties note that we had specifically proposed changes to the the *Ruarch* policy and the *Anax* doctrine. *See Ruarch Associates*, 103 FCC 2d 1178 (1986); *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981); *see also NPRM* 5 FCC Rcd at 4052, 4053 (1990).

27. However, neither our *Ruarch* nor *Anax* proposals evidenced any intention on the part of the Commission to change the underlying comparative criteria. Rather, with respect to the *Ruarch* policy, we sought comment on the circumstances in which applicants should be released from their comparative promises and techniques to enforce adherence to those promises after grant. We did not suggest any changes in the comparative import of any such promises. Similarly, with regard to *Anax*, we put forth proposals that, if adopted, would have altered the way in which the Commission applied its integration criteria to certain applicants, but we did not indicate any intention to change the underlying comparative criteria. Moreover, the rule and policy changes adopted in the *Report and Order* in this proceeding were limited to the procedural aspects of comparative proceedings, not the criteria that would be used to evaluate the comparative merits of applicants. 6 FCC Rcd at 159-160, 161-62 (1990). Although the changes in the comparative criteria proposed by the NAACP and Rochlis could also serve to expedite hearings by making the comparative process less attractive for participation by some potential competing applicants, we believe that any changes in our comparative criteria would be inappropriate in this proceeding.

28. In a supplemental filing, Rochlis argues that changes in the comparative criteria may be adopted as "general statements of policy" without prior notice and comment. *See* 5 U.S.C. § 553(b)(A). However, our decision not to adopt changes in the comparative criteria in this proceeding is based on the nature of the proceeding, rather than the legal sufficiency of the notice to support such changes. This proceeding focused primarily on the procedures by which evidence is adduced and decisions are made, not the substantive criteria that weigh on those decisions. Thus, we do not believe that this proceeding is the appropriate vehicle to achieve additions, deletions, or alterations of the comparative criteria upon which these cases are decided, and the NAACP and Rochlis suggestions for changes to the comparative criteria are beyond the scope of this proceeding.

CONCLUSION

29. The rule changes being adopted on reconsideration have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to impose no new or modified requirements or burdens on the public.

30. Accordingly, IT IS ORDERED that the Petition for Partial Reconsideration filed by the Federal Communications Bar Association IS GRANTED to the extent indicated above and IS DENIED in all other respects.

31. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration filed by Timothy K. Brady, *et al* IS DENIED.

32. IT IS FURTHER ORDERED that the Petition for Reconsideration and/or Clarification filed by Black Citizens for a Fair Media, *et al* IS GRANTED insofar as clarification is provided above and IS DENIED in all other respects.

33. IT IS FURTHER ORDERED that the Petition for Reconsideration, or in the Alternative Petition for Rule Making filed by the National Association for the Advancement of Colored People, *et al* IS DENIED insofar as it requests reconsideration, but that pleading and the comments thereon filed by Jeffrey Rochlis will be treated as a petition for rule making.

34. IT IS FURTHER ORDERED that Parts 1, and 73 of the Commissions rules, 47 C.F.R. Parts 1, and 73, ARE AMENDED as set forth in the Appendix hereto.

35. IT IS FURTHER ORDERED that the rule changes adopted in the *Report and Order* in this proceeding, as modified herein, shall become effective on July 1, 1991, except that the modification of the *Ruarch* policy enunciated in the *Report and Order* in this proceeding, as modified herein, shall become effective on August 1, 1991, and it shall apply to all requests for approval of settlements filed on that date and thereafter.

36. IT IS FURTHER ORDERED that all commercial broadcast applications that have been the subject of a public notice released prior to July 1, 1991, announcing the acceptance for filing of mutually exclusive applications, shall pay their hearing fee by July 15, 1991, unless an order designating such applications for hearing is released before that date. All applicants designated for hearing by orders released before July 15, 1991, should pay their hearing fee with their Notices of Appearance. A Public Notice setting forth fee payment procedures is appended hereto and will be released simultaneously with the release of this Memorandum Opinion and Order.

37. This action is taken pursuant to authority contained in sections 4(i), 4(j), 5(b), 5(c), 303(r) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(b), 155(c), 303(r) and 309.

For further information concerning this proceeding, contact Martin Blumenthal, Office of General Counsel (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Parts 1, and 73 are amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.80 is amended by adding a new paragraph (g)(3) to read as follows:

§ 1.80 Forfeiture proceedings.

* * * * *

(g) * * *

(3) Where the possible assessment of a forfeiture is an issue in a hearing case to determine which pending application should be granted, and the applicant facing a potential forfeiture is dismissed pursuant to a settlement agreement or otherwise, and the presiding judge has not made a determination on the forfeiture issue, the order of dismissal shall be forwarded to the attention of the full Commission. Within the time provided by section 1.117 of this Part, the Commission may, on its own motion, proceed with a determination of whether a forfeiture against the dismissing applicant is warranted. If the Commission so proceeds, it will provide the applicant with a reasonable opportunity to respond to the forfeiture issue (*see* paragraph (f)(3) of this section) and make a determination under the procedures outlined in paragraph (f) of this section.

* * * * *

3. Section 1.221 is amended by removing paragraph (c)(1) and adding new paragraphs (f) and (g) to read as follows:

* * * * *

§ 1.221 Notice of hearing; appearances.

* * * * *

(f) A fee must accompany each written appearance filed with the Commission in certain cases designated for hearing. *See* Subpart G, Part 1 for the amount due. Except as provided in paragragh (g) of this section, the fee must accompany each written appearance at the time of its filing and must be in conformance with the requirements of Subpart G of the rules. A written appearance that does not contain the proper fee, or is not accompanied by a deferral request as per §1.1115 of the rules, shall be dismissed and returned to the applicant by the fee processing staff. The presiding judge will be notified of this action and may dismiss the applicant with prejudice for failure to prosecute if the written appearance is not resubmitted with the correct fee within the original 20 day filing period.

Note: If the parties file a settlement agreement prior to filing the Notice of Appearance or simultaneously with it, the hearing fee need not accompany the Notice of Appearance. In filing the Notice of Appearance, the applicant should clearly indicate that a settlement agreement has been filed. (The fact that there are ongoing negotiations that may lead to a settlement does not affect the requirement to pay the fee.) If a settlement agreement is not effectuated, the Presiding Judge will require immediate payment of the fee.

(g) In comparative broadcast proceedings involving applicants for new facilities, where the hearing fee was paid before designation of the applications for hearing as required by the Public Notice described at § 73.3571(c), 73.3572(d), or 73.3573(g) of this chapter, a hearing fee payment should not be made with the filing of the Notice of Appearance.

4. Section 1.229 is amended by revising paragraph (e) to read as follows:

§ 1.229 Motions to enlarge, change, or delete issues.

* * * * *

(e) In comparative broadcast proceedings involving applicants for only new facilities, in addition to the showing with respect to the requested issue modification described in paragraph (d) of this section, the party requesting the enlargement of issues against an applicant in the proceeding shall identify those documents the moving party wishes to have produced and any other discovery procedures the moving party wishes to employ in the event the requested issue is added to the proceeding.

(1) In the event the motion to enlarge issues is granted, the Commission or delegated authority acting on the motion will also rule on the additional discovery requests, and, if granted, such additional discovery will be scheduled to be completed within 30 days of the action on the motion.

(2) The moving party may file supplemental discovery requests on the basis of information provided in responsive pleadings or discovered as a result of intitial discovery on the enlarged issue. The grant or denial of any such supplemental requests and the timing of the completion of such supplemental discovery are subject to the discretion of the presiding judge.

(3) The 30-day time limit for completion of discovery on enlarged issues shall not apply where the persons subject to such additional discovery are not parties to the proceeding. In such case, additional time will be required to afford such persons adequate notice of the discovery procedures being employed.

* * * * *

5. Section 1.325 is amended by revising paragraph (c) introductory text, (c)(1) introductory text, (c)(2) introductory text and (c)(3) introductory text to read as follows:

§ 1.325 Discovery and production of documents and things for inspection, copying, or photographing.

* * * * *

(c) In comparative broadcast proceedings involving applicants for only new facilities, all applicants will serve the materials listed in the Standard Document Production Order and the Standardized Integration Statement on all other parties in the case that have filed Notices of Appearance. The exchange of these materials must be accomplished within five days after the date established for filing notices of appearance (see § 1.221 of this part).

(1) *Standard Document Production Order.* The following documents must be produced or objected to on grounds of priviledge (Unless otherwise directed by the presiding officer, copies of these documents should not be filed with the presiding officer):

* * * * *

(2) *Standardized Integration Statement.* On the same day that documents are exchanged pursuant to the Standardized Document Production Order, the following information must also be provided by all applicants (Copies of this statement should be filed with the presiding officer and served on all parties to the proceeding that have filed Notices of Appearance):

* * * * *

(3) *Supplemental document production.* Parties may request additional relevant documents, not called for in the Standard Document Production Order, at any time after the release of the designation order. Supplemental requests for documents based on materials exchanged pursuant to the Standardized Document Production Order and Standardized Integration Statement must be filed no later than ten days after those standardized exchanges. Other supplemental document requests must be filed no later than ten days after receipt of the information on which those requests are based. Supplemental document requests will be handled under the procedures established in paragraph (a) of this section. To facilitate the resolution of disputes concerning the production of documents, the presiding officer may convene a pre-hearing conference to hear argument on and dispose of any such disputes.

6. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

7. Section 73.1620 is amended by revising paragraph (g) introductory text to read as follows:

§ 73.1620 Program tests.

* * * * *

(g) *Reports required.* In their application for a license to cover a construction permit (FCC Form 302) and on the first anniversary of the commencement of program tests, applicants for new broadcast facilities that were granted after designation for a comparative hearing as a result of a post designation settlement or a decision favoring them after comparative consideration must report

* * * * *

APPENDIX A

PROCEDURES FOR THE PAYMENT OF HEARING FEES BY APPLICANTS FOR BROADCAST FACILITIES

The Commission has determined that comparative applicants for broadcast facilities must pay their hearing fees before they are designated for a comparative hearing. *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 158, *recon. gtd. in part*, FCC 91-154, adopted May 9, 1991.

Commencing on July 1, 1991, the deadline by which commercial broadcast applicants must pay their hearing fee will be established in the Public Notice announcing the acceptance of mutually exclusive applications for the facility. *See* 47 C.F.R. §§ 73.3571(c) (for AM), 73.3572(c) (for TV), 73.3573(f)(2) (for non-reserved band FM filed during a "window"). Generally, that date will be thirty (30) days after the deadline for filing petitions to deny, a date which is also established in the Public Notice.

IF A COMMERCIAL APPLICANT HAS BEEN ACCEPTED FOR FILING IN A PUBLIC NOTICE RELEASED PRIOR TO JULY 1, 1991, APPLICANT MUST PAY ITS HEARING FEE ON JULY 15, 1991.

This hearing fee payment requirement also applies to *renewal applicants* where a public notice announcing the acceptance for filing of a competing application was released prior to July 1, 1991.

Filing Procedures for July 15, 1991 Submissions:

The hearing fee should be transmitted to the Commission's lockbox bank in Pittsburgh, Pennsylvania so that it is received by the bank before midnight July 15, 1991. The mailing address for all commercial radio and TV hearing fees is:

Federal Communications Commission
Mass Media Services
P.O. Box 358170
Pittsburgh, PA 15251-5170

Each $6,760 payment must be accompanied by an FCC Form 155 and a cover letter.

The FCC Form 155 must be appropriately filled out, including the name and address of the applicant and the file number of the application. *When entering the file number for new applications, omit the first letters of the file number.* ("BPH" for FM, "BPCT" for TV, and "BP" or "BMP" for AM). Renewal applicants should enter their call sign. The fee type code for radio applicants is MWR. The fee type code for TV applicants is MWT.

To ensure proper credit of the payment, the cover letter accompanying the submission should identify the applicant, the application file number (or call sign), *and the city and state of the proposed facility.*

Failure to make the hearing fee payment in a timely manner will result in the dismissal of the underlying pending application. Generally, an applicant will be informed that it has been dismissed for failure to make a timely payment of the hearing fee by letter. However, if dismissing an application by letter would delay the preparation of an HDO, the dismissal will be announced in the HDO, and if a case has been designated for hearing, the presiding judge will be informed of an applicant's failure to make timely payment of the hearing fee. If a timely submitted payment instrument proves to be uncollectible, the Office of Managing Director will inform the Mass Media Bureau or presiding judge, as appropriate, of the failure of the payment instrument, and the underlying application will be subject to dismissal.

Any requests for reconsideration of the dismissal of applications for fee defects should be addressed to the Commission's Managing Director. If the underlying hearing fee has not been paid, full payment of that fee must accompany the request for reconsideration.

Exceptions to the Fee Payment Requirement:

1. *Singletons.* If no mutually exclusive applications have been accepted for filing, your application is a singleton, and you are *not* required to pay the hearing fee. However, a later notice may announce the acceptance of mutually exclusive applications, and that notice will establish the hearing fee payment date for all applicants in the group.

2. *Settlements.* If *all* mutually exclusive applicants agree to a settlement and a request to approve the settlement is filed with the Commission on or before July 15, 1991, the applicants are *not* required to pay the hearing fee on that date. Settlement papers must be filed directly with the Commission's Secretary in Washington, D.C., *not through the lockbox bank.* In the case of a pre-designation settlement, the sole surviving applicant will be treated as a singleton.

3. *Designations.* If a Hearing Designation Order setting the mutually exclusive applicants for hearing is *released* prior to July 15, 1991, the applicants are not required to pay the hearing fee on that date. However, the applicants are required to pay the hearing fee with their Notices of Appearance. Failure to do so on the date established for filing a Notice of Appearance, *see* 47 C.F.R. 1.221, can result in dismissal of the application for failure to prosecute. To avoid any confusion that may be caused by the release of an HDO just prior to July 15, 1991, no HDOs will be released from July 8, 1991 to July 15, 1991.

Hearing Fee Refunds:

Refunds of the hearing will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing.

After an applicant has been designated for hearing, the hearing fee may also be refunded under the circumstances provided for in section 1.1111(c) of our rules. 47 C.F.R. § 1.1111(c).

FOOTNOTES

[1] No oppositions to the Petitions for Reconsideration were filed, but on March 8, 1991, Jeffrey Rochlis (Rochlis) filed comments on the NAACP petition. No reply pleadings were filed.

[2] The challenging applicant must pay its hearing fee on the date established in the Public Notice announcing the acceptance for filing of that application, and we believe it is only fair that the renewal applicant should pay its hearing fee at the same time. Thus, the date for fee payment established in the Public Notice of acceptance of the challenging application will also be the date on which the renewal applicant must pay its hearing fee. Where the challenging application was accepted for filing in a Public Notice released before July 1, 1991, Appendix A specifies the method of hearing fee payment for both the renewal applicant and challenger.

[3] With further regard to the standardized document production order and integration statement, we agree with the FCBA's comment that disputes over the sufficiency of an exchange should not be elevated to a question of whether an applicant should be dismissed. However, a failure to exchange any materials would constitute a failure to prosecute, resulting in the dismissal of an applicant. Moreover, as the FCBA suggests, the submission of a standard integration statement after designation for hearing does not give rise to an opportunity to upgrade any previously submitted integration proposal.

[4] Twenty one days notice is required for depositions of persons who are not principals of an applicant in the case.

[5] The *Report and Order* provided 60 days for the filing of findings and replies, including 45 days for findings and 15 days for replies. We noted, however, that if delays in obtaining hearing transcripts is not a factor, findings should be filed within 30 days.

[6] After hearings, an ALJ's decision to assess a forfeiture would be rendered under section 1.80(g) of our rules. 47 C.F.R. § 1.80(g). However, where the ALJ does not render a decision on the forfeiture matter because the application is dismissed, any Commission decision on the forfeiture matter would be rendered pursuant to section 1.80(f) of our rules. 47 C.F.R. § 1.80(f).

[7] Motions to enlarge issues filed before the effective date of these rule changes need not include discovery requests, and ALJs should permit traditional discovery on any new issues. However, motions to enlarge issues filed after the effective date of these rules must include the required discovery request.

[8] In any event, although BCFM and other parties suggested modification of the holding period rule in this proceeding, no change in that provision was proposed, and we consider the matter beyond the scope of this proceeding.

[9] The reporting requirement in section 73.1620(g) was approved by the Office of Management and Budget on March 22, 1991. OMB No. 3060-0471. The amendment to the rule being

adopted herein is not a "substantive or material modification" that would require further approval from OMB under the Paperwork Reduction Act. *See* 5 C.F.R. § 1320.11(h).

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Re: REFORM OF THE COMPARATIVE HEARING PROCESS TO EXPEDITE THE RESOLUTION OF CASES, (General Docket No. 90-264)

While I understand that this docket dealt primarily with procedural reform issues, I also am concerned with the comparative criteria proposals that were not addressed in this docket, but saved for a later day. [1] To the extent there are filings in this docket that propose comparative criteria, such as a "pioneer preference", which may or may not enhance the Commission's overall comparative process, I am uncomfortable with pushing such issues aside without further analysis or, as a minimum, establishing a definitive plan for further review and analysis of such proposals. Thus, I am supporting this item with the understanding that issues not addressed herein, but saved for a later day, will be reviewed in the context of an advisory committee that looks at these and other issues affecting small communications businesses in general, and minority or female participation in particular. I have recommended that this Commission establish an advisory committee that will review policy issues affecting small businesses in existing and new communications services, mass media or otherwise, including matters beyond the scope of this particular proceeding. My separate statement in conjunction with the Notice of Proposed Rulemaking regarding the Revision of Radio Rules and Policies, further clarifies my concerns in these matters. The Commission must be sensitive not only to reforming its existing processes, but also to considering the implications of such changes on small businesses, particularly new entrants, who wish to participate in the communications revolution of this Information Age.

[1] See Order at paras. 26-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-234

In re Applications of

CHARISMA BROADCASTING CORPORATION	File No. BPCT-850207KG
ARLINGTON 68 TV, INC.	File No. BPCT-850418KZ
UNITED BROADCAST GROUP, LTD.	File No. BPCT-850419KE
SOUTHWEST COMMUNICATIONS, LTD.	File No. BPCT-850419KO
JOHNSON TELEVISION, LTD.	File No. BPCT-850422KG
BRISCOE BROADCASTING, LTD.	File No. BPCT-850422KH
METROPLEX COMMUNICATIONS, INC.	File No. BPCT-850422KP
SAMMY A. THORNTON	File No. BPCT-850422KR
NATIVE AMERICAN BROADCASTING COMPANY, A LIMITED PARTNERSHIP	File No. BPCT-850422KU

For a Construction Permit
for New Television Station,
Channel 68,
Arlington, Texas

Appearances

Morton L. Berfield and *John J. Schauble* on behalf of Charisma Broadcasting Corporation; *Donald E. Ward* and *Chester F. Naumowicz* on behalf of Arlington 68 TV, Inc.; *Bradford D. Carey* on behalf of *United Broadcast Group, Ltd.* ; *Dennis F. Begley* and *Matthew H. McCormick* on behalf of Southwest Communications, Ltd.; *L. Kendall Satterfield* on behalf of Metroplex Communications, Inc.; *James L. Oyster* on behalf of Sammy A. Thornton; and *Lee W. Shubert* on behalf of Native American Broadcasting Company, A Limited Partnership.

DECISION

Adopted: May 14, 1991; Released: May 31, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. This case returns to the Board on exceptions filed by the remaining seven applicants. *See Supplemental Initial Decision*, 5 FCC Rcd 6655 (1990) (*SID*), of Administrative Law Judge Joseph P. Gonzalez (ALJ). The *SID* awarded the construction permit for a new television station on Channel 68 at Arlington, Texas to Charisma Broadcasting Corporation (Charisma). Now pending before the Board are limited exceptions filed by Charisma, on December 13, 1990, as well as exceptions filed on various dates from December 10 to 13, 1990 by Arlington 68 TV, Inc. (Arlington 68), United Broadcasting Group, Ltd. (United), Southwest Communications, Ltd. (Southwest), Metroplex Communications, Inc. (Metroplex), Sammy A. Thornton (Thornton), and Native American Broadcasting Company, A Limited Partnership (Native). Replies were filed, between December 24 to 27, 1990, by Arlington 68, Metroplex, Charisma, United and Thornton. Two other applicants, Johnson Television, Ltd. and Briscoe Broadcasting, Ltd. failed to file exceptions to the *SID*. Both applicants also failed to respond to a motion to dismiss their applications, filed by United on December 27, 1990. Therefore, we will dismiss the applications of Johnson and Briscoe. And, as explained below, we reverse the *SID* and award the construction permit to Metroplex.

BACKGROUND

2. In his original *Initial Decision*, 4 FCC Rcd 4018 (1989) (*I.D.*), the ALJ granted the application of Channel 68, North Texas Television Limited Partnership (North Texas). However, after North Texas' financial qualifications were challenged in exceptions, the Board remanded the case for a hearing on this sole issue against North Texas. *Memorandum Opinion and Order*, 5 FCC Rcd 2916 (Rev. Bd. 1990). Shortly before the remand hearing, though, North Texas requested that its application be dismissed. Originally, the ALJ had credited only North Texas, Charisma and Thornton with 100% ownership/management integration. Now, given a choice between the latter two 100% proposals, the ALJ selected Charisma as the comparatively superior applicant, because of its minority and female ownership enhancement credit.

3. The seven applicants who have filed exceptions to the *SID* reiterate, for the most part, their exceptions to the *I.D.* and focus on the two front-runners, Charisma and Thornton. Charisma requests that, if the *SID* is not affirmed, an issue be added against Thornton to determine whether, during his hearing testimony, he misrepresented the extent of his involvement in his mother's television station on Channel 55 at Lake Dallas, Texas. Similarly, several other exceptors request that a diversification demerit be assessed against Thornton. Thornton, as well as several other exceptors, disagree with the *I.D.* 's failure to assess a demerit against Charisma because of the owner-

ship of a company, by its president, Walter J. Grant, Jr., which produces and distributes Grant's televised religious sermons. The 100% integration credited to Charisma is also challenged by the exceptors, who allege that two of the applicant's three directors, both female, are "window dressing," and, furthermore, that Grant himself will be unable to fulfill his integration pledge because of his extensive out-of-town prayer meetings. These exceptions are not decisional because neither Charisma nor Thornton is the qualitatively superior applicant. *See* para. 21, *infra*.

4. We now turn to the significant exceptions concerning the remaining five applicants: (a) Metroplex; (b) Arlington 68; (c) United; (d) Southwest; and (e) Native.

DISCUSSION

5. *Metroplex*. This corporate applicant is comprised of two shareholders: 51% (president) Rosario Leal, and 49% (vice-president) Elizabeth Flores. Both Leal and Flores are Hispanic females. Leal, who has worked at several out-of-town radio stations, proposes to move to Arlington to be the general manager of this television station. Flores, who has lived in Dallas since 1979, and has some past broadcast experience and substantial civic involvement in the service area, will be the station manager (*I.D.*, paras. 133-138). Metroplex argues in its exceptions that the *I.D.* erred in crediting it with less than 100% integration simply because its direct case failed to state exactly how many hours per week principals Rosario Leal and Elizabeth Flores would work at the station. Metroplex points out that its written direct case stated that both principals would work "fulltime" and that documents submitted in this proceeding, before the receipt of the direct case, specifically stated that both women intended to work at least 40 hours per week.

6. The record establishes that in its "Statement of Integration Proposal," filed on October 23, 1985, pursuant to the ALJ's prehearing order, FCC 85M-3997, released October 11, 1985, Metroplex stated:

> In the event Metroplex's application is granted, Ms. Leal will work full-time (*at least 40 hours per week*) at the station as its General Manager. She will perform all of the duties normally associated with that position at a television station including overall supervision and responsibility for management of the station. Ms. Flores will work full-time (*at least 40 hours per week)* at the proposed station as Station Manager, and will perform all of the duties normally associated with that position, including day-to-day supervisory authority over station operations. Ms. Leal and Ms. Flores will resign from their current jobs in order to assume their positions at the proposed station. (Emphasis added.)

Later, on January 31, 1986, Metroplex answered interogatories regarding the standard comparative issue, stating again that Leal and Flores would work at the Arlington station "40 hours each week, five days a week, for an indefinite time."

7. However, Metroplex's written direct case, filed on August 12, 1986, did not parenthetically re-state the 40-hour quantitative factors:

STATEMENT OF ROSARIO LEAL

My name is Rosario Leal. I am President, Treasurer, a Director and a voting shareholder of Metroplex, in which I hold a 51% interest.

Integration Proposal

In the event Metroplex's application for construction permit is granted, I will terminate my current employment to serve as General Manager of the station. *I plan to fully integrate myself on a full-time basis* into the management of the proposed station if Metroplex is awarded the construction permit in this proceeding. As General Manager, I will perform all of the duties normally associated with that position, including overall supervision and responsibility for the management of the proposed television facility. I also will administer and implement the Equal Employment Opportunity program.

(Metroplex Ex. 3; emphasis added.)

STATEMENT OF ELIZABETH FLORES

My name is Elizabeth Flores. I am Vice President, Secretary, a Director and a voting shareholder of Metroplex, in which I hold a 49% interest.

Integration Proposal

In the event Metroplex's application for construction permit is granted, I will resign from my current position to serve as Station Manager of the station. *I plan to fully integrate myself on a full-time basis* into the management of the station if Metroplex is awarded the construction permit. As Station Manager, I will perform all of the duties normally associated with the position of Station Manager, including day-to-day supervisory authority over station operations.

(Metroplex Ex. 4; emphasis added.)

When Leal and Flores testified on September 16, 1986 at the hearing, opposing counsel did not question them about the meaning of "on a full-time basis" in their direct case exhibits.

8. After considering this factual record, in the light of controlling precedent, the Board has concluded that Metroplex is entitled to 100% full-time integration credit. In *Vacationland Broadcasting Company, Inc.*, 97 FCC 2d 485, 492 (Rev. Bd. 1984)(subsequent history omitted), we held that applicants should "specifically state in their direct written cases the precise hour-per-week commitment proposed for each integrated principal. Failure to provide this information or substantial justification for its absence *may* lead to denial or diminution of the integration credit sought." (emphasis added). In *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6318-19 (Rev. Bd. 1990), however, we recognized that an applicant's failure to quantify its hours-per-week integration commitment in its direct case can be a "harmless technical error" where the pre-filed integration statement contained this information, and where there is shown "no variance or

'contingencies,' [and] no delay or prejudice appeared likely . . . ." Here, Metroplex clearly proposed *twice* before the filing of its direct case that its two principals would each devote a minimum of 40 hours per week to the operation of the proposed station. On the record, there is no indication that these quantitative commitments changed between the October 23, 1985 "Integration Statement" and August 12, 1986 direct case. Further, we detect no prejudice to the other applicants. Opposing counsel had every opportunity at hearing to probe the subject integration proposals; neither Metroplex principal was challenged. Therefore, the failure of Metroplex to attach the 40-hour label to its full-time commitment for Leal and Flores in its direct case is a harmless technicality and the record reveals no substantive basis upon which to discredit the full-time integration proposal of this applicant. *See Mableton, supra.*

9. *Arlington 68.* This corporate applicant consists of Jo Ann Reyes, who holds all of the voting stock, and two purported nonvoting shareholders. The *I.D.* did not reach a conclusion as to whether the nonvoting shareholders were truly insulated, but rather eliminated Arlington 68 from further comparative consideration by denying Reyes any integration credit. We affirm the *I.D.* in this regard. Specifically, in a January 20, 1988 statement, Arlington 68 reported that Reyes intended to run for a United States congressional seat in Texas. The ALJ thus concluded that Reyes' July 14, 1986 proposal (Arlington 68 Exhibit 3) to work full-time at the Arlington station was "clearly incompatible with her Congressional aspirations." (*I.D.*, para. 43). Arlington 68 now contends that the ALJ erred in ignoring the fact that Reyes was defeated in her general election bid in November 1988. Thus, it is Arlington 68's position that there never existed an actual conflict between Reyes' plan to work at the station and serve as a United States Representative. Further, Arlington 68 contends that there never even existed a potential conflict between these two job aspirations because it was possible that Reyes, if elected in 1988, would not have sought re-election in 1990 and that Arlington 68, if it received the construction permit, probably would not have built the station until after 1990.

10. The ALJ properly denied any integration credit to Reyes because of her inconsistent political and broadcasting station aspirations. It is well-settled that if, at the time an integration pledge is made to the Commission, an extrinsic contingency could vitiate that pledge, credit will not be awarded. Thus, for example, credit was denied to a Selbyville, Delaware applicant in *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2438-39 (Rev. Bd. 1990) (subsequent history omitted), because she simultaneously had on file two other broadcast applications where she also planned to integrate, depending on which construction permit was awarded first. Since her Selbyville pledge was, thus, contingent on events over which she had no control, no credit was awarded. Similarly here, Reyes' 1986 integration proposal shortly thereafter became contingent on the success, *vel non*, of her 1988 congressional campaign, the outcome of which (we must presume) could not be predicted. But, for obvious reasons, integration credit will not be awarded where the applicant has a potential conflict with a pending pledge to devote full-time to managing the particular broadcast property at contest, and the cases are legion where such credit has been denied. *See, e.g., Julia S. Zozaya*, 5 FCC Rcd 6607 (1990) (pledge conflicted by ownership of another station and extensive other activities); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3955 (Rev. Bd. 1988)(pledge conflicts with McDonald's restaurant franchise terms)(subsequent history omitted); *Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1614 (Rev. Bd. 1985)(pledge conflicts with political office)(subsequent history omitted); *Virgil S. Pearman*, 5 FCC Rcd 5697, 5699-5700 (Rev. Bd. 1990)(same)(subsequent history omitted). In the situation before us, Reyes' 1986 full-time integration pledge, on its face unequivocal, became purely speculative, once she chose to seek instead a congressional seat. Having made that deliberate choice in 1988, her 1986 unconditional integration pledge went by the boards.

11. Nor is it relevant that Reyes political campaign was unsuccessful. That was a purely fortuitous (nay infortuitous) occurrence. It is black-letter law than an applicant in hearing may not upgrade its comparative standing. *Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 216-217 (Rev. Bd. 1984)(subsequent history omitted). Once an applicant, in the midst of a hearing, loses entitlement to a comparative claim, it may not reinstate that claim merely because circumstances change again at some later time. *See, e.g., V.O.B., Inc.*, 5 FCC Rcd 5872 (Rev. Bd. 1990), *citing Nuance Corp.*, 85 FCC 2d 412, 418-19 (Rev. Bd. 1981), *review denied*, FCC 81-473, released October 7, 1981. In fact, no better reason is presented for refusing to recognize "contingent" comparative status than Reyes' secondary speculation that, even had she been elected to Congress in 1988, she *might not* have sought re-election in 1990 (or thereafter). In awarding full-time management integration credit, the Commission cannot be expected (1) to predict whether a congressional candidate will (or won't) be elected; and, *then*, (2) predict again whether that applicant, *if elected*, will (or won't) run for re-election. In this, Reyes asks far too much, and her contingent 1986 pledge will not be honored for comparative purposes here.

12. *United.* This limited partnership is comprised of four principals: general partner Dr. OK Kyun Kim, with a 25% ownership interest, and limited partners David Line (31% ownership), Joey Kang (25% ownership), and Been Fu Lee (19% ownership). With the exception of Line, who is a personal injury lawyer in Dallas, all of the principals are of Korean ancestry. United sought 100% integration credit based on Kim's proposal to serve as the station's full-time general manager. However, the ALJ reduced this figure to 25%, based on Kim's ownership share, concluding that the limited partners were not truly insulated from the management of the partnership. In this regard, the ALJ found that the limited partners had significant roles in prosecuting the application, *I.D.* paras. 50-53, and concluded (*id.*, para. 56) that:

> [the limited partners] have been consulted by Dr. Kim on a regular basis with respect to matters of substance regarding that application, and have made additional capital contributions to the enterprise when requested to do so, although the Partnership Agreement itself specifically states that no additional contributions from the limited partners are required (United Exh. 2, p. 52, Section 8.1). The financial obligations assumed by United's limited partners more closely resemble those of a general partner. United's representation that its limited partners will play passive, non-participatory roles in the manage-

> ment and control of United's business is simply not credible in view of United's past history which demonstrates that they have participated actively in prosecuting United's application. United's claim of a 100 percent integration credit therefore will be reduced to account for the ownership interests of United's limited partners.

United disagrees with the ALJ's characterization of the limited partners, claiming that, on a regular basis, Kim merely consulted with and informed the limited partners of the status of the pending application.

13. We affirm the *I.D.* 's limit of 25% integration credit to United. By his own admission, Kim testified that "[a]nything, whatever we do in this proceeding . . . I discuss with them." (Tr. 1766). These discussions even included what type of programming the station would have (Tr. 1765-66). Significantly, limited partner Line, and not Kim, located and brought the other two limited partners into the partnership. *See National Communications Industries*, FCC 91R-27, released April 8, 1991 ("passive" investor, who was a lawyer, contacted other investors to join applicant). Line also performed legal work in connection with the creation and filing of United's partnership agreement, the publication of its local notice, and the establishment of its public file. (*I.D.*, paras. 50-51)

14. Line's legal services and other substantive participatory activities (standing alone) constitute, as the Commission has stated, "the *antithesis* of a passive investor." *Mark L. Wodlinger*, 3 FCC Rcd 3139, 3141 (Rev. Bd. 1988) (quoting *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986)). Additionally, the meaningful participation of the other limited partners in United's legal, financial, and business affairs, after the formation of the limited partnership, fully justify the ALJ's refusal to award it 100% integration credit. *See Coast TV*, 5 FCC Rcd 2571 (1990). Accordingly, United's integration credit will be limited to Kim's 25% share, because only he proposes to work at the station.

15. *Southwest*. This limited partnership is comprised of 10% general partner Paula Wiley, a black female with no past broadcast experience, and David Wagner, Jr., the 90% non-minority male limited partner, who has equity interests in two other broadcast stations, and, as of 1987, interests in two other pending broadcast applications (Tr. 4987). Wagner is also an attorney (Tr. 4998). In addition to numerous actions initiated or undertaken by Wagner regarding the formation of Southwest in 1985 and the period leading up to the filing of its application, Wagner retained the right to terminate the partnership unilaterally until after the release of the *I.D.* in this case. *See* para. 17 *infra*. Based on his findings, *I.D.*, paras. 65-68, the ALJ concluded that Wagner had total control over the applicant and therefore denied any integration credit for Wiley. Southwest contends, however, that under the partnership agreement Wagner has no power to manage and control the business and, further, that Wagner has in fact not done so. Also, Southwest notes that it has deleted the provision in its partnership agreement giving Wagner the sole unrestrained right to terminate the partnership. In explaining the reason for the existence of such a provision in the first place, Southwest notes that in 1985 it was unforseeable that this proceeding would have lasted until 1990.

16. The ALJ's denial of any integration credit for Wiley is affirmed. The ALJ found that Wagner first learned of the availability of Channel 68, it was Wagner who contacted Wiley, it was Wagner who suggested the formation of a limited partnership and the 90%-10% equity split in his favor, it was Wagner who suggested communications counsel, and it was Wagner who supplied his partner with the partnership agreement. Of equal significance, Wiley followed all of Wagner's suggestions, and did not question any aspect of the limited partnership. Our review of the record also reveals the fact that Wiley never even knew of Wagner before he contacted her *by telephone* and invited her to join the partnership (Tr. 1969); that Wiley never even met Wagner until after the application was filed (Tr. 1991), and then only once (Tr. 1993); that Wiley never questioned Wagner's ability to terminate the partnership at will (Tr. 1905); and that Wiley never questioned or examined Wagner's financial ability in connnection with his participation as a 90% owner in the venture.

17. The totality of the record evidence undoubtedly shows that, notwithstanding the putative control vested in Wiley through the partnership agreement and certain activities undertaken by her in preparing and prosecuting the application, the true ownership and control of Southwest lies with Wagner. *See Payne Communications, Inc.*, 1 FCC Rcd 1052, 1059 (Rev. Bd. 1986). On the record before us, this case is controlled by *Poughkeepsie Broadcasting Limited*, FCC 91-139, released May 9, 1991, where the Commission indicated that when individuals, such as Wagner, who organized the applicant "are giving away control or ownership in a manner that is patently unreasonable on its face . . . it is unrealistic to conclude that an applicant's proposed grant of exclusive and integrated control to nominally active principals is reliable." *See Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997, 3025 n. 48 (1990); *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), *modified*, 5 FCC Rcd 5610 (1990). Moreover, Wagner's unilateral "power of life or death" over the partnership from 1985 to 1989, standing alone, would be fatal to Southwest's comparative case. *Doylan Forney*, 3 FCC Rcd 6330, 6332 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 5423 (1990). Further, Wagner's belated relinquishment after the denial of Southwest's comparative credit in the *I.D.* in 1989 came too late in the comparative process and is therefore of no significance in the evaluation of Southwest's integration proposal. *See Payne*, *supra* at 1055. Accordingly, no integration credit will be given to Southwest.

18. *Native*. This is another limited partnership to which the *I.D.* awarded no integration credit whatsoever, but for a different reason: the *de facto* control of the applicant by a non-principal, Isaac Blevins, who is the husband of the 20% general partner, Sandra Blevins. Based on the testimony of Ms. Blevins, the *I.D.* concluded that this applicant failed to demonstrate that the putative sole general partner would act independently of her husband. Specifically, the *I. D.* found that Mr. Blevins told Ms. Blevins about Channel 68 in the first place, suggested to his wife staffing and operating proposals for the station, took the initial steps in creating the public file, contacted several banks, on his own, regarding financing, and helped Ms. Blevins in obtaining a transmitter site (*I.D.*, para. 158). Further, Ms. Blevins only knew Charles Crossno, the engineer whom she relied upon heavily for assistance in preparing and prosecuting her application, through her husband, who had a pre-existing social and business rela-

tionship with Crossno (*I.D.*, para. 165). Also, Ms. Blevins testified that her husband would quit his present position as the general manager of a broadcast station in Plano, Texas, and might work at her Arlington station if she won the construction permit. (*I.D.*, para. 161). In its exceptions, Native contends that Ms. Blevins "made *all* decisions regarding the operation and financing of the station *independently*." (Exceptions at p. 11) (emphasis added). Moreover, Native claims that the *I.D.*'s contrary conclusion was based on speculation and gender bias.

19. We affirm the ALJ's conclusion that Native is entitled to no integration credit. Contrary to Native's arguments about the independence of Ms. Blevins, the record -- consisting largely of Ms. Blevins' own testimony -- establishes that virtually every action regarding the formation and prosecution of Native's application is traceable to an affirmative action taken by Mr. Blevins. As a corollary matter, the record is devoid of any significant action taken by Ms. Blevins on her own. Rather, Ms. Blevins' "actions" were of a mere passive or ministerial character, such as deciding to file the application after being informed by her husband of the availability of Channel 68 (Tr. 4428), approving the limited partnership agreement without question (Tr. 4430), accepting engineer Crossno's lump-sum cost estimate without question (Tr. 4476, 4478), agreeing to the selection of the transmitter site by her engineer upon a single visit to the site (Tr. 4462), and obtaining her 80% limited partner after an inquiry initiated by her engineer (Tr. 4424-25). As was the case in *Richard P. Bott II*, 4 FCC Rcd 4924, 4929 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 2508 (1990), *aff'd sub nom. Radio Representatives Inc. v. FCC*, No. 90-12217 (D.C. Cir. Feb. 22, 1991), where the husband, an already-established broadcaster, learned of the availability of the station himself, recommended counsel to his wife, sought financing for her by himself and assisted her in preparing the application and obtaining a transmitter site, the record here establishes that the Blevins "have functioned, and will likely function, as a marital unit" regarding this station. Even more telling here is the fact that, unlike *Bott*, the wife has no broadcast experience, and there exists the likelihood that Mr. Blevins will wind up working at his wife's station. Accordingly, Natives' integration proposal is not credible. *See N.E.O. Broadcasting Company*, 103 FCC 2d 1031, 1035 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986) (wife's integration credit discounted where she merely acquiesced in husband's decisions and actions). "Such gamesmanship will not be rewarded." *National Communications Industries*, *supra*, at para. 16, citing *Richard P. Bott, II*, *supra*.

CONCLUSION

20. As previously noted, the ALJ in his *SID* found that only Charisma and Thornton were entitled to 100% integration credit, and that neither was subject to a diversification demerit of any degree. Charisma was selected over Thornton because two of Charisma's three integrated principals were female (67%) and one of those women was a Black minority (33%). Compared to Thornton, whose only principal was a white male, Charisma was entitled to a "moderate comparative advantage." 5 FCC Rcd at 6655. Now that Metroplex has been awarded 100% fulltime integration credit, and no diversification demerit, Metroplex is the comparative winner against the other 100% proposals of Charisma and Thornton. Metroplex's qualitative superiority rests upon its 100% minority ownership, 100% female ownership, and 100% past broadcast experience; additionally its credit for service area residence (49%) is buttressed by substantial civic activities.

21. It is well-settled that in choosing among applicants with equal "quantitative" integration proposals, minority ownership and local residence in the city of license are the most important "qualitative" comparative criteria, and that both of these factors are of equal importance. *See Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). Metroplex's clear advantage is based upon its two (100%) Hispanic minority and female owners. By contrast, of Charisma's three principals, only one is black (33%) and only two of three are females (67%). Thornton is a single white male entitled to no credit on these factors. Turning to local residence, we note that none of the three applicants has a principal currently living in Arlington, Texas. All of Charisma and Thornton's integrated principals reside in the proposed service area, as compared only to Metroplex's 49% principal. (*I.D.*, paras. 16, 19, 22, 134, 137, 146). This advantage does not defeat Metroplex's minority and female advantages, however, because local residence in the service area is not as important a factor as residence in the city of license. *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269 (Rev. Bd. 1990). Moreover, their local residence is diminished since it is not coupled with substantial civic activities. *See Ronald Sorenson*, FCC 91-93, released April 9, 1991. Here, Metroplex's 51% principal has pledged to relocate to Arlington, and Metroplex's residence credit is further enhanced because its 49% principal has a substantial record of civic involvement. Thornton has no civic involvement; and Charisma's is limited to church activities. *See Ronald Sorenson*, supra; *Rebecca L. Boedker*, FCC 91-143, released May 13, 1991 (extensive record of civic activities indicates greater likelihood of knowledge of and interest in community). Finally, Charisma and Thornton have no past broadcast experience; by contrast, both of Metroplex's principals have significant past broadcast experience. *Boedker*, *supra* (past broadcast experience warrants a moderate enhancement). Thus, the clear qualitative winner is Metroplex.

22. ACCORDINGLY, IT IS ORDERED, That the Motion to Enlarge Issues, filed on July 5, 1989 against Thornton by Channel 68, North Texas Television Limited Partnership IS DISMISSED AS MOOT; and,

23. IT IS FURTHER ORDERED That the Petition for Leave to Amend, filed on August 1, 1989 by Thornton, pursuant to 47 CFR §1.65, IS GRANTED and the amendment IS ACCEPTED; and,

24. IT IS FURTHER ORDERED, That the Statement for the Record, filed on August 2, 1989, by Southwest, IS ACCEPTED for reporting purposes pursuant to 47 CFR §1.65; and,

25. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed on September 28, 1989 by Native, pursuant to 47 CFR §1.65, IS GRANTED, and the amendment IS ACCEPTED; and,

26. IT IS FURTHER ORDERED, That the Motion for Leave to Amend, filed on January 18, 1990 by Metroplex, pursuant to 47 CFR §1.65, IS GRANTED, and the amendment IS ACCEPTED; and,

27. IT IS FURTHER ORDERED, That the Motion for Leave to Amend, filed on September 24, 1990 by Metroplex, pursuant to 47 CFR §1.65, IS GRANTED, and the amendment IS ACCEPTED; and,

28. IT IS FURTHER ORDERED, That the Motion to Dismiss, filed by United on December 27, 1990, IS GRANTED, and the applications of Johnson Television, Ltd. (File No. BPCT-850422KG) and Briscoe Broadcasting, Ltd. (File No. BPCT-850422KH) ARE DISMISSED; and;

29. IT IS FURTHER ORDERED, That the application of Charisma Broadcasting Corporation (File No. BPCT-850207KG), Arlington 68 TV, Inc. (File No. BPCT-850418KZ), United Broadcast Group, Ltd. (File No. BPCT-850419KE), Southwest Communications, Ltd. (File No. BPCT-850419KO), Sammy A. Thornton (File No. BPCT-850422KR), and Native American Broadcasting Company, A Limited Partnership (File No. BPCT-850422KU) ARE DENIED; and,

30. IT IS FURTHER ORDERED, That the application of Metroplex Communications, Inc. for a construction permit for a new television station on Channel 68 at Arlington, Texas (File No. BPCT-850422KP) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-375

Amendment of Part 73	RM-6236
of the Rules to provide	RM-6237
for an additional FM	
station class (Class C3)	
and to increase the	
maximum transmitting	
power for Class A FM stations	

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1991; Released: May 30, 1991

By the Commission:

INTRODUCTION

1. Before the Commission are petitions for reconsideration and clarification of the *Second Report and Order* ("*Second Report* ") in this proceeding. [1] The petitions generally support the actions taken in the *Second Report*, but raise questions as to the interpretation of, and need for, some of the new rules.

BACKGROUND

2. This proceeding was initiated on July 20, 1988, by a *Notice of Proposed Rule Making* ("*Notice* "). [2] The *First Report and Order* [3] created a new C3 Class of FM station to which many Class A stations in Zone II[4] could upgrade. In the *Second Report*, the Commission adopted rules which allow licensees of Class A FM stations an opportunity to increase effective radiated power up to a maximum of 6 kilowatts (kW) at an antenna height above average terrain (HAAT) of 100 meters (m) or its equivalent. This increase in power required the adoption of increased separation distances for Class A stations to prevent interference. Existing stations at locations that did not meet the new separation distances (i.e., stations that became short-spaced as a result of the rule change), were "grandfathered." [5]

3. Before addressing the specific issues raised in the petitions, we believe a restatement of what the *Second Report* allows would provide useful guidance. First, a basic premise in that decision is that no interference is permitted. Discussing the difference between allowing a blanket power increase and a selective power increase in paragraph 49 of the *Second Report*, we stated, "[w]hile a selective increase in power is consistent with the public interest, it should not be accomplished at the expense of reducing coverage or interfering with other existing facilities." In paragraph 52, we indicated that "we wish to extend authority to increase power where possible, so long as it does not interfere with other stations." In paragraph 58, we declared that "we have attempted to... fashion flexible rules that will provide optimum benefit to the public by encouraging improved FM broadcast service, while maintaining the quality and extent of existing FM service." That still describes a basic objective in this proceeding and is a significant element in determining whether a particular proposal is consistent with the public interest.

4. The ability of any particular Class A station to take advantage of this opportunity to increase power depends on its particular circumstances. There are three broad categories of circumstances. A single Class A station may find itself in more than one category with respect to other individual stations. The various different conditions described below would apply to each station pair depending on its category.

5. Category 1 includes those situations where the station to station spacing exceeds the minimum distance separation specified for the new 6 kW Class A stations. Category 2 includes the situations where the station-to-station spacing is less than the minimum distance separation specified for the new 6 kW Class A stations, but more than the minimum specified for the old 3 kW Class A stations. Category 3 includes the situations where the station-to-station spacing is less than the minimum distance separation specified for the old 3 kW Class A stations. To illustrate, the old (3 kW) separation requirement for co-channel Class A to Class B stations is 163 kilometers (km). The new (6 kW) rule requires 178 km between such stations. In this example, Category 1 situations would have a spacing of 178 km or greater; Category 2 situations would have a spacing between 163 and 178 km; and Category 3 situations would have a spacing of less than 163 km. Of course, the separation distances for the categories will depend on the actual classes and channel relationships of the stations involved.

6. Class A stations in Category 1 situations may increase to 6 kW at 100 m HAAT or its equivalent without consent or other special requirements. Class A stations in Category 2 situations have a variety of options. Class A stations in Category 3 situations fall into either of two groupings, each having a set of options.

7. Category 2 stations may change facilities, provided 3 kW at 100 m HAAT equivalency is not exceeded. For stations that have an HAAT greater than 100 meters, the equivalency determination is based on not exceeding a (1

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[1] *See Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

[2] *See Notice of Proposed Rule Making*, MM Docket No. 88-375, 3 FCC Rcd 5941 (1988).

[3] *See First Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 2792 (1989).

[4] Zone II includes all of the United States except areas of the northeast United States and the southern part of California.

[5] The separation distances were increased so that 6 kW Class A stations would have no more interference potential than 3 kW Class A stations. However, the *Second Report* also included rules that permit licensees of newly short-spaced Class A stations to increase power if they obtain the consent of the licensees of co-channel and adjacent channel stations which might be affected and the increase is consistent with the public interest.

mV/m or 60 dBu) class contour distance of 24 km. [6] For stations that have an HAAT less than 100 meters, the equivalency determination is based on the distance to the predicted 0.05 mV/m (34 dBu) F(50, 10) field strength contour not exceeding 98 km. These provisions are found in §73.213(c)(1). Consent of other licensees is not required. [7]

8. A second option for Category 2 stations is to change site within the area that qualifies them as Category 2. As in the first option, 3 kW at 100 m HAAT equivalency must not be exceeded. The same §73.213(c)(1) equivalency provisions apply to this option and consent of other licensees is not required.

9. A third option for Category 2 stations is to apply for a modification pursuant to the contour protection provisions of §73.215. Consent of other licensees is not required. A fourth option for Category 2 situations is available if both involved stations are Class A stations. They both may increase to 6 kW at 100 m HAAT or its equivalent if the increases are mutual and are otherwise consistent with the public interest.

10. A fifth option for a Category 2 station is a unilateral increase in facilities, up to a maximum of 6 kW at 100 m HAAT or its equivalent, provided several conditions are met: (a) The consent of the affected station must be obtained; (b) The increase must be consistent with the public interest; and, for Class A stations short-spaced to non-Class A stations, (c) No fully spaced or less short-spaced transmitter site is available. This option is available either at the existing transmitter site or in conjunction with a move to a new Category 2 transmitter site. The final option for a Category 2 situation is to change site to meet the new (6 kW) spacing requirements, in which case the Category 1 option is available (increase to 6 kW at 100 m HAAT or equivalent without consent or special requirements).

11. The first grouping in Category 3 includes those stations at locations authorized prior to November 16, 1964, that did not meet the separation distances required by §73.207 and have remained short-spaced since that time. Stations in this situation may modify their facilities in accordance with §73.213(a), up to a maximum power of 6 kW at an HAAT of 100 meters, or the equivalent power for a greater HAAT. They also may apply for modifications pursuant to the contour protection provisions of §73.215. Finally, they may change site to increase the distance between the stations so that they become Category 2 or Category 1 situations, in which case the options appropriate to those categories would be available.

12. The other Category 3 grouping consists of those Class A stations that are in a Category 3 situation because of distance requirement waivers, changes in the rules or other reasons. These stations were not directly addressed in the *Second Report*. Their options are discussed and clarified in paragraph 37, *infra*.

13. Petitions for reconsideration, partial reconsideration, and/or clarification of the rule amendments adopted in the *Second Report* were submitted by the National Association of Broadcasters ("NAB") and the United Class A Broadcasters Coalition ("Coalition"). [8] The broadcast engineering consulting firm of du Treil, Lundin & Rackley, Inc. ("DLR") submitted a petition for reconsideration approximately two months late that we have treated as late-filed comments. [9] CBS, Inc. ("CBS") submitted a statement in support of NAB's petition. Generally, the Coalition believes that some of the new rules unnecessarily handicap licensees of Class A stations from obtaining improved coverage. NAB and CBS, however, believe that the new rules are necessary to prevent degradation of the FM service, but question whether they are sufficiently restrictive and detailed to do so.

DISCUSSION

Provisions for obtaining consent for a power increase

Issue

14. Section 73.213(c)(2) of the Commission's rules allows existing Class A stations that became short-spaced as a result of the increased spacing requirements the opportunity to increase power if such stations first obtain the consent of the stations to which they are short-spaced. NAB requests that the Commission specify procedures for obtaining that consent to insure that the process is not used to circumvent spacing requirements and decline to accept applications that do not comply with those procedures. NAB suggests that the licensee of each station fitting the Commission's description of an "affected station" [10] be notified by certified mail of proposed power increases and that before applying for such an increase, the applicant should furnish the Commission with a certificate indicating that it has previously obtained affirmative responses from all affected parties. Such written consent would be submitted to the Commission with the certificate. NAB apparently also believes that the consent

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[6] This provision was in effect prior to this rulemaking and is included here for completeness.

[7] In a connected matter, we wish to clarify our policy regarding applications for construction permits filed to implement allotments resulting from petitions for rule making to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment. In addition, such applications must meet the new spacing requirements with respect to all pending applications that are fully spaced to the reference point for the new allotment.

[8] The Coalition is an umbrella organization of numerous Class A broadcasters.

[9] DLR argued that a waiver of the filing deadline is warranted because of the complex nature of the proceeding and its inability to fully anticipate how the rules would be applied in concrete situations. We find these grounds for a waiver of the filing deadline insufficient. Treating the DLR petition as late-filed comments, we have considered them to the extent they are relevant to the issues on reconsideration.

[10] Section 73.213(c)(2) describes "affected stations" as those on co-channel or first, second or third adjacent channels that would be short-spaced to the proposed facility.

provisions should apply to stations for which short-spacing is sought through the use of directional antennas permitted by §73.215. [11]

15. NAB further suggests that the rules be clarified to indicate that properly-spaced stations may not become short-spaced as a result of their licensees having obtained the consent of affected FM station licensees. In cases in which consent is given, NAB also wishes the Commission to consider, in its public interest assessment, whether there is a loss of service inconsistent with §307(b) of the Communications Act so that the consent procedure cannot be used as a means to "negotiate interference." [12] CBS agrees with NAB and states that the Commission should adopt formal notice and filing procedures requiring Class A FM station licensees seeking to increase power to notify licensees of potentially affected stations in writing and to submit to the Commission such licensees' written consent to the proposed power increase.

16. While generally opposing the NAB proposals, the Coalition does suggest that the Commission might consider specifying the details of the consent procedure for those situations where a Class A station licensee does not propose to provide contour protection pursuant to §73.215 of the Commission's Rules. [13] In such cases, the Coalition suggests that applicants only be required to notify affected stations by certified mail and submit the receipts or certification of consents from such stations as part of the application.

17. NAB, however, disagrees with this position and states that it does not consider any directional antenna use to be automatically consistent with the current interference protection standards. Therefore, NAB contends the licensees of a potentially affected station should have the opportunity to decide whether adequate protection is being afforded, not the applicant for the increase in power.

18. The Coalition counters this argument by first noting that station applicants make no final determinations of whether another station is adequately protected or not. Rather, such determinations are made by the Commission. Second, the Coalition notes the Commission has already made the judgment that directional antennas can be used, pursuant to §73.215, to provide adequate protection to affected stations, and points out that §73.215, in most cases, requires directional antenna use to be more accurately described in terms of signal pattern prediction than non-directional antenna systems. Thus, the Coalition concludes that there is no basis for requiring Class A station licensees who provide §73.215 protection to other stations to first acquire a consent from the licensees of potentially affected stations.

Analysis

19. Sections 73.213 and 73.215 represent two separate approaches to obtaining a power increase. Applications filed pursuant to §73.215 do not require the consent of other licensees because full protection will be afforded to all stations' service contours.[14] However, §73.213(c)(2) states that "Each application to operate a Class A station with an ERP and HAAT such that the reference distance[15] would exceed 24 kilometers must contain an *exhibit demonstrating the consent* (emphasis ours) of the licensee of each co-channel, first, second or third adjacent channel station (for which the requirements of §73.207 [16] are not met) to a grant of that application. "The rule does not address the manner of securing consent because that process is merely incidental. Consent cannot be procured without adequate notification. As a practical matter, our experience indicates that the "exhibit demonstrating consent" is provided by all §73.213(c)(2) applicants and consists either of a letter indicating specific consent, or an agreement between two licensees seeking a mutual power increase. A simple declaration on the part of an applicant that consent has been obtained is not adequate and is not acceptable. We emphasize that "consent" is not and may not be the equivalent of "negotiated acceptance of interference. "Rather, it is an acknowledgement of the proposed modification and an indication that it is not objectionable. Consent also serves the practical purpose of greatly reducing the technical showings and arguments that would otherwise be required. [17]

20. NAB apparently believes that consent will be presumed if the licensee of a short-spaced station fails to respond to a request for consent to a grant of a §73.213(c)(2) application. The discussion in the preceding paragraph clearly indicates that this is not the case. A non-response on the part of a short-spaced licensee will not be interpreted as consent. We see no value in requiring §73.213(c)(2) applicants to notify short-spaced licensees by certified mail, or in requiring such receipts to be furnished to us as proof of notification because we are only interested in the exhibit of consent, not the manner of obtaining it.

Exemption from the eight-kilometer limit on short-spaced Class A station operation

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[11] *See* NAB's *Opposition to United Class A Broadcasters Coalition's Petition for Reconsideration*, at p. 4

[12] NAB is on record in several Commission proceedings as opposing the concept of negotiation of interference rights. *See*, e.g., NAB Comments in MM Docket No. 87-267, filed February 1, 1988, at 10-12.

[13] The Coalition suggests that if a licensee of a short-spaced Class A facility, applying for a power increase pursuant to alternative provisions found in §73.215, can demonstrate that because of a directional antenna, uneven terrain, or an antenna height reduction, coverage would not increase in a short-spaced direction, there should be no need to obtain the consent of other licensees.

[14] Thus, the Coalition misinterprets the consent requirement if it believes that the requirement applies to short-spaced Class A stations for which a power increase is sought pursuant to §73.215. The responsibility for ensuring that proper protection is afforded by applicants filing pursuant to §73.215 rests with the Commission, not any other party.

[15] The 24 kilometers (roughly 15 miles) "reference distance" is the approximate distance to the 1 mV/m service contour of a former (3 kW @ 100 meter HAAT) full-facility Class A station.

[16] Section 73.207 specifies the normal separation distances required between the various full-facility classes of stations. Stations which do not meet those distances are considered short-spaced.

[17] As described in the background section above, the rules currently make it abundantly clear that the consent provisions are specifically for *grandfathered* short-spaced stations. Thus, it is clear that non-short-spaced station licensees may not submit applications for modification under any part of §73.213

Issue

21. Section 73.215 of the Commission's Rules currently places a temporary 8 kilometer (5 mile) limit on the amount of short-spacing applicants may propose for FM stations authorized pursuant to its contour protection provisions. [18] Because reconsideration of the Commission's FM short-spacing decision in MM Docket No. 87-121 is still pending, NAB requests the Commission not to exempt Class A stations from the 8 kilometer short-spacing limit. NAB fears that Commission policies which increasingly focus on contour protection (such as §73.215), rather than distance separations, are inevitably destined to degrade the FM broadcast service. CBS supports NAB's contention and suggests that until such time as the propagation algorithms become reliable, the Commission should forego accepting applications involving contour protection being afforded by newly short-spaced Class A stations. The Coalition counters by stating that any action the Commission takes here need not prejudge the pending reconsideration of MM Docket No. 87-121 if the Commission makes clear that any exemption from the five-mile limit will be subject to the final outcome in that proceeding. The Coalition asserts that by NAB's challenging the accuracy of the Commission's current FM propagation prediction methodology at this juncture, it in effect is also challenging the current FM spacing requirements which are derived from the same prediction methods.

Analysis

22. The 8 kilometer limit adopted in MM Docket No. 87-121 was imposed merely as a temporary measure to restrict the number of §73.215 applications our FM processing staff would receive initially. It was not imposed because we had any doubts about the adequacy of the §73.215 contour protection provisions. Because we wanted as many Class A FM stations to be upgraded as possible, given the benefits of increased Class A coverage, the *Second Report* exempted Class A stations from the 8 kilometer short-spacing limit. We do not find NAB's concern about the contour protection provision in §73.215 sufficient to warrant our reconsideration of this decision. As noted by the Coalition, the distance separation requirements in our rules are based on calculations of signal strength contours using the same propagation model which is at the heart of the contour protection provisions in §73.215. We see no reason to single out Class A stations using the contour protection method of §73.215 as the only stations to which concerns about that section would apply. Neither do we see any compelling reason to cease processing applications based on rules derived from the propagation curves we have used for many years. Our propagation model may evolve and improve. But we believe public interest concerns, including the prompt initiation of new service, do not warrant our delaying applications pending such improvement. Moreover, matters regarding the adequacy of the contour protection provisions in §73.215 are more properly addressed in the reconsideration in the MM Docket No. 87-121 proceeding.

Public interest showings

Issue

23. Section 73.213(c)(2) states that the Commission will grant a short-spaced license under its provisions only if it finds that the grant is consistent with the public interest. The Coalition interprets §73.213(c)(2) to require a public interest showing by applicants seeking power increases for newly short-spaced Class A stations. The Coalition states that such a provision is necessary only when a request is made to increase coverage in a short-spaced direction; but in the case where a licensee of a Class A station increases power unilaterally, the service gain will typically outweigh service loss, thereby obviating the need for a specific public interest showing. NAB supports the need for the Commission to make determinations that its grants are in the public interest, but states that such findings are *pro forma* if the applicant has met all other relevant requirements.

Analysis

24. Section 73.213(c)(2) does not require applicants to submit a special "public interest showing. "It states that "Applications submitted pursuant to the provisions of this paragraph may be granted only if such action is consistent with the public interest. " The burden is on the Commission to make the finding, taking all of the facts before it into account. To make such a determination, the Commission may request additional information not solicited in the usual application forms. In practice such requests are specific and limited, and do not require the applicant to submit a "public interest showing." Therefore, the Coalition's petition in this respect is misdirected and warrants no change in the current policy.

[18] *See Second Report* at § 57.

The availability of non-short-spaced locations

Issue

25. Section 73.213(c)(2) states that "Applications that specify a transmitter site which is short-spaced to an FM station other than another Class A station which is seeking a mutual increase in facilities may be granted only if no alternative fully-spaced site or less short-spaced site is available. Licensees of Class A stations seeking mutual increases in facilities need not show that a fully-spaced or less short-spaced site is available." [19] The Coalition contends there is no basis for requiring Class A stations short-spaced to stations of other classes and seeking to increase power at existing sites to first show that no fully spaced or less short-spaced site is available. Such showings, suggests the Coalition, should only be required when an applicant seeks a waiver to install a full-facility transmitter at a *new* short-spaced site. DLR agrees with the Coalition.

26. As a general rule, NAB believes that the Commission should always consider the availability of alternative sites as a means to avoid increases in FM band interference. [20] NAB notes that station licensees wishing to upgrade at their current sites can do so by using FM directional antennas, and that for such stations, a showing of alternative sites should not be a necessary prerequisite for a grant of an upgrade application. [21] However, NAB believes that such a showing should be required for stations that will be relocated. [22]

Analysis

27. Our experience subsequent to the adoption of the *Second Report* indicates that nearly every licensee of a Class A station seeking a facility upgrade wishes to do so at its current station location. Relocating such stations is simply not cost-effective in most situations.

Because power increases sought pursuant to §73.213(c)(2) require the consent of all potentially affected licensees, the current requirement for a showing of nonalternative site availability appears unduly restrictive in the case of stations for which relocation is not practicable. We agree with all of the parties that such a showing should be required in the case of a §73.213(c)(2) application involving both an increase in facilities and station relocation. [23] Thus, §73.213(c)(2) is amended to reflect the modified requirement, thereby granting the Coalition's petition in this respect.

Second and third adjacent channel protection

Issue

28. Section 73.213(c)(1) sets forth co-channel and adjacent channel separation criteria applicable to "grandfathered" Class A stations that cannot meet the new separations based on maximum Class A facilities of 6 kW at an antenna HAAT of 100 meters. These separations were those formerly contained in §73.207. As a result of action taken in the *Second Report and Order* in MM Docket No. 86-144, the table includes separation distances which protect the service of second and third adjacent channel stations. [24]

29. The Coalition objects to our protecting second and third adjacent channel facilities, noting that for over 20 years (prior to the action taken in Docket 86-144) the Commission routinely permitted grandfathered short-spaced stations to modify facilities without consideration of second and third adjacencies. The Coalition seeks reconsideration, arguing that because the Commission permitted facility modifications for two decades for second and third adjacent FM stations already short-spaced, including Class C stations with 100 kW of power, there is no good reason why short-spaced Class A stations should not be able to increase coverage in second and third adjacent channel directions. Lastly, the Coalition suggests that adequate public notice had not been given concerning this matter, pursuant to 5 U.S.C. §553 (b) and (c). Thus, it concludes that the Commission may not lawfully rely on revised §73.213 to prohibit power increases in directions of second and third adjacent channel stations.

30. NAB contends that the Coalition's arguments are without merit. NAB notes that in MM Docket No. 86-144, the Commission determined that allowing grandfathered short-spaced stations to continue to routinely modify their facilities without considering second and third adjacencies would increase the probability of interference and be inconsistent with the efficient use of the FM spectrum. NAB asserts that, of all the forms of interference, second and third adjacent channel interference is potentially the most damaging because it occurs in the signal coverage area where the adversely affected station would normally have its strongest signal. Thus, NAB asserts that to ignore such interference for an entire class of stations that seek to increase power would seriously damage the technical integrity of the FM service.

31. However, DLR asserts that many Class A stations are short-spaced to second and third adjacent channel facilities and thus have practically no opportunity to increase power under the new rules. DLR suggests that allowing relocation of these facilities provided there is no increase in population receiving interference within the coverage contour of the larger facility would enable the larger facility to retain the size of its potential audience, while allowing additional population to be served by the modified Class A facility.

Analysis

32. As the Coalition notes, action taken in MM Docket No. 86-144 eliminated the exclusion which formerly permitted shortspaced station licensees authorized prior to November 16, 1964, to avoid protecting second and third adjacent channel stations. However, the Coalition filed no

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[19] This requirement only applies to applications submitted pursuant to §73.213, not to those submitted pursuant to §73.215.

[20] *See* NAB *Opposition Comments* at p. 5.

[21] *Ibid.* The reference to "FM directional antennas" suggests that this opinion is applicable only to §73.215 applications, not to §73.213 applications.

[22] *Ibid.* Upgrades pursuant to §73.213 do not necessarily involve station relocation.

[23] Such a showing would not be required in connection with a §73.215 application because such facilities are expected to fully protect the service of other FM stations.

[24] *See Second Report and Order*, MM Docket No. 86-144, 2 FCC Rcd 5693.

petition for reconsideration at that time. Revisiting that action now would be inappropriate. Moreover, adequate notice of second and third adjacent channel separation distances was presented for public consideration in the *Notice of Proposed Rule Making* of this proceeding. [25] Therefore, the Coalition's allegations of procedural deficiencies are without merit. The suggestion made by DLR which is summarized in the preceding paragraph is clearly outside the scope of this proceeding.

Other matters

33. The Commission's FM application processing staff has identified several problems with respect to the Class A power increase rules.

34. First, the question has arisen as to how §73.213(c)(2) should be applied in the case where two Class A licensees are short-spaced with respect to each other, where they agree to mutual power increases, but where one licensee is not prepared to effectuate the increase in consonance with the other licensee. The rule is silent with respect to a staggered or deferred power increase. We now recognize that financial limitations or other factors may preclude a simultaneous increase in the power of two short-spaced Class A stations, at least during a particular period of time. This can result in a significant problem. While a unilateral power increase with the consent of a short-spaced, non-upgrading Class A licensee is possible, such consent is likely to be rare, because the consenting licensee, when applying for a facility upgrade at some later date, must protect both the new and the old service of the Class A station upgraded first. [26]

35. We believe there is an equitable solution to the problem defined in the previous paragraph. Accordingly, we have adopted the following policy in such cases. Because most short-spacing cases do not involve minimal short-spacing (i.e., minimal spacing based on the former mutual maximum facilities of 3 kW @ 100 meters HAAT), some unilateral increase in power will generally be possible which will not lead to future conflicts or loss of service.

36. For example, let us presume that the short-spacing between two Class A stations is such that a mutual power increase to 4.0 kW and an HAAT of 100 meters would be possible with no contour overlap or disruption of existing service. [27] We will permit such a unilateral increase in power with the consent of the non-upgrading, short-spaced Class A licensee. This will permit a prompt enhancement of service of the station initially upgraded. Sometime later, circumstances may permit the upgrade of the other station, which can then be upgraded to a power of 4.0 kW and an HAAT of 100 meters. At such a point in time, the two short-spaced licensees could effect a new agreement to mutually upgrade to 6 kW, if both are able to do so. [28] In this way, the upgrade potential of both stations would be preserved and no interference would be caused to established service. We want to emphasize that while we will not deny a unilateral power increase to 6 kW on the part of a Class A station short-spaced to another Class A station, where the consent of the non-upgrading licensee is given, we want the consenting licensee to be fully aware of the consequences of such consent (i.e., possible preclusion for a subsequent facility increase to 6 kW at 100 meters HAAT.) This being the case, we believe most unilateral power increases on the part of one Class A station short-spaced to another will follow the procedure we have just described.

37. As mentioned in paragraph 12, *supra*, there are stations that were first authorized after November 16, 1964 to use a transmitter site that does not meet the spacing distances formerly required for 3 kW Class A stations. Up until now, these stations have been permitted to increase power up to 3 kW at an HAAT of 100 meters, or equivalent power for a greater HAAT, at their present site. In addition to, or in conjunction with, this first option, they may change to a new site which maintains or increases the distance between the stations. They also may apply for a modification pursuant to the contour protection provisions of §73.215. Finally, they may change site to increase the distance between the stations so that they meet the former 3 kW spacing requirements, or the existing 6 kW spacing requirements, in which case the options described in paragraphs 5 - 10 for those situations would be available.

38. We wish to clarify the status of Class A stations short-spaced after November 16, 1964. Section 73.213(c) implies that only those authorized Class A stations which

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[25] *See Notice of Proposed Rule Making*, MM Docket No. 88-375, Appendix A, proposed §73.207(b)(1), 3 FCC Rcd 5941 (1988).

[26] Because §73.213 does not envision interference being caused to existing service, the subsequent consent of a Class A licensee upgrading initially cannot be presumed. This constitutes a disincentive for a Class A licensee unable to upgrade for whatever reason to consent to an upgrade sought by the licensee of another short-spaced facility.

[27] The following method of calculation shall be used:

First, assume both stations to be operating with an 8-radial HAAT of 100 meters. Then, by means of contour studies conducted using the methods specified in §73.215, determine the theoretical power at which each station could operate while not causing interference to the other, assuming the other station is at the same power.

Next, determine the actual power at which each station could operate based on their actual currently licensed 8-radial HAAT's. For stations with licensed HAAT's at or below 100 meters, this is done by determining the ERP that would yield the same distance to the *interference* contour as determined in the first step *supra*. This ERP cannot exceed 6.0 kW. For stations with licensed HAAT's in excess of 100 meters, this is done by determining the ERP that would yield the same distance to the *protected* contour as determined in the first step *supra*.

To illustrate, assume Station "A" currently operates with an ERP of 3.0 kW and a licensed 8-radial HAAT of 88 meters while Station "B" operates on the same channel with an ERP of 2.0 kW and HAAT of 123 meters. Since both are Class A stations on the same channel, the protected and interfering contours would be the F(50, 50) 60 dBu and the F(50, 10) 40 dBu, respectively. Also assume that, based on the contour study, both stations could operate with a theoretical ERP of 4.0 kW (at 100 meters HAAT) without either station interfering with the other. Then, Station "A" could operate with an actual ERP of 4.6 kW (at 88 meters HAAT) and Station "B" could operate with an actual ERP of 2.65 kW (at 123 meters HAAT).

[28] This example is not intended to preclude the possibility of an initial upgrade agreement outlining the scenario described. In other words, both licensees could initially agree on an ultimate upgrade to 6 kW, with a unilateral upgrade to 4.0 kW in the short term.

became short-spaced as a result of the increased separation distances adopted in this rule making may be modified or relocated in accordance with that rule section. However, because all such facility increases are contingent upon the consent of affected cochannel and adjacent channel licensees, and because we have allowed the grandfathered short-spaced stations authorized prior to November 16, 1964 the opportunity to increase power to 6 kW, we believe it is eminently fair and equitable to allow up to 6 kW ERP for the remaining Class A stations that were short-spaced prior to the adoption of the *Second Report*. Therefore, we are amending §73.213(c) accordingly.

39. The question has also been posed as to whether Class A station licensees wishing to increase power in accordance with §73.213 or §73.215 should be able to maintain their existing coverage in short-spaced directions. [29] DLR believes that a licensee seeking a power increase for a station that has existing overlap with another FM station, will have to reduce existing coverage in those directions where the prohibited overlap occurs. DLR suggests that such licensees would be penalized if they were required to reduce facilities to less than the equivalent of 3 kilowatts and 100 meters in any direction as part of an overall power increase.

40. The provisions in §73.213 are intended to maximally protect the service of other short-spaced stations. Nevertheless, we see no reason why licensees seeking to enhance their service should forfeit service already established in directions where some overlap exists. Therefore, we will permit facility enhancements sought pursuant to §73.213 that retain current coverage in directions where overlap exists, provided no new predicted interference is created to the current service of any other short-spaced co-channel and adjacent channel licensees.

41. Another clarification involves §73.207(b)(3), which states that under the Mexico-United States FM Broadcasting Agreement, Class A stations operating with more than 3 kW ERP and 100 meters HAAT are treated as Class B stations. The correct antenna height in accordance with that Agreement should be 91 meters HAAT. We are editorially amending this rule section to reflect the correct figure.

42. Lastly, §73.207(b)(2), regarding the spacings to be used for U. S. stations relative to Canadian allotments and assignments, states in part that, "... U.S. Class A assignments operating with more than 3 kW ERP and 100 meters antenna HAAT. . . are considered to be Class B1. "Similar language is found in §73.207(b)(3) regarding spacings to Mexican allotments and assignments. We note that some applicants requesting facilities in excess of 3 kW ERP at 100 meters HAAT for new Class A stations located within 320 kilometers of the Canadian or Mexican borders have had their applications returned as unacceptable for filing. We take this opportunity to explain certain rules and the differences between applications for new facilities and those seeking to improve existing authorized facilities.

43. As explained in §73.1650, FM authorizations are subject to compliance with Bi-lateral Agreements that the U.S. has with Canada and Mexico. Those agreements define, among other things, classes of stations by power and height limitations and specify minimum distance separation requirements. For convenient reference, those separation requirements have been incorporated in §73.207 as Tables B and C. Because some domestic classes are not defined in these agreements or may have different limitations, §§73.207(b)(2) and (3) explain what substitutions must be made *in order to apply the tables correctly*.

44. The two Bi-lateral Agreements each contain a table of allotments which associates classes of stations, as defined in the agreement, with specific channels and communities. As a consequence, allotments within 320 kilometers of the Canadian and Mexican borders are listed twice - once in our domestic table (§73.202) and once in the appropriate agreement.

45. A difficulty arises when a particular allotment is shown as Class A both in our domestic table and in either agreement. Domestically, the Class A limits are 6 kW at 100 m, but in the Canadian and Mexican agreements they are 3 kW at 100 m and 3 kW at 91 m respectively. Before we authorize Class A facilities in a border zone which specify values that exceed the 3 kW at 100 m or 3 kW at 91 m limitation, we must first obtain the concurrence of Canada or Mexico to modify the appropriate bilateral table (but not our domestic table), so as to change the allotment to Class B1 (Canada) or Class B (Mexico). Of course the allotment must meet the B1 or B distance separations with respect to foreign allotments and assignments.

46. In the case of a vacant Class A allotment in a border zone, an interested party may request the FCC to obtain Canadian or Mexican concurrence to upgrade the allotment to B1 or B in the appropriate bi-lateral table. It will remain a Class A allotment in the domestic table and no applications exceeding 3 kW at 100 m (or 3 kW at 91 m) will be accepted for that allotment until international coordination is completed. In the case of an existing Class A authorization in a border zone, the licensee may simultaneously file an application which specifies facilities in excess of 3 kW at 100 m (or 3 kW at 91 m), and a request for the Commission to obtain international consent to a modification of the bi-lateral table. The application will not be processed until the international coordination is resolved.

47. Applications for a vacant Class A allotment which specify facilities in excess of 3 kW at 100 m within the Canadian border zone or 3 kW at 91 m within the Mexican border zone are not acceptable for filing unless the table of allotments in the applicable agreement has already been changed to a higher class. Further, applications for vacant allotments which do not conform to a bi-lateral table but which are accompanied by requests for negotiations to amend the bi-lateral table also are not acceptable for filing.

48. In the interest of fairness to competing applicants and other affected parties, and in order to expedite service to the public, the Commission's "hard look" processing standards adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), specify that applications must be acceptable for filing at the close of the amendment as of right period. A request that the Com-

[29] The question of protection to be afforded pursuant to §73.215 will not be addressed here because it is being reconsidered in the pending MM Docket No. 87-121 proceeding.

mission seek international clearance for an application not filed in accordance with the applicable agreement is, in essence, a request for waiver of our "hard look" processing requirements. In the case of multiple applicants for an allotment, such waiver would be unfair to the other applicants who fully complied with the acceptability criteria. Additionally, even for single applicants for new stations, there is no guarantee that negotiations would be successful and, even if successful, the undue delay involved in obtaining clearance and, thus, implementing new service to the community could be substantial. Requests for negotiations on behalf of existing stations, however, do not trigger similar detrimental public interest consequences and we will therefore hold them on file pending the outcome of such negotiations. We note that once an applicant for a new station receives a construction permit, an application for a power increase accompanied by a request for negotiations may be filed.

REGULATORY FLEXIBILITY ANALYSIS

49. In accordance with the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), a regulatory flexibility analysis follows:

I. Need and purpose of this action:

This action is intended to provide additional opportunities for improving the facilities of existing Class A FM broadcast stations. The rules adopted herein somewhat reduce the showing required by applicants of short-spaced Class A FM stations.

II. Summary of Issues Raised by Public Comment in Response to the Final Regulatory Flexibility Analysis:

No commenters addressed either the Initial Regulatory Flexibility Analysis or the Final Regulatory Flexibility Analysis, or raised Regulatory Flexibility issues as such on reconsideration.

III. Significant Alternatives Considered and Rejected:

There were no significant alternatives to the action taken herein that were not discussed.

50. The Secretary shall send a copy of this Report, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §601 *et seq.*, (1981)).

PAPERWORK REDUCTION ACT STATEMENT

51. The decisions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden that the Commission imposes on the public. This reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

52. Accordingly, IT IS ORDERED THAT the Petitions for Reconsideration and/or Clarification ARE GRANTED as specified above and ARE DENIED in all other respects. IT IS FURTHER ORDERED THAT, pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303, and effective **July 15, 1991,** Part 73 of the Commission's Rules IS AMENDED as set forth below in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

APPENDIX

47 CFR Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.207 is amended by revising the introductory text of paragraph (b)(3) to read as follows:

Section 73.207 Minimum distance separation between stations.

* * * * *

(b)* * *

(3) Under the Mexico - United States FM Broadcasting Agreement, domestic U.S. allotments and assignments within 320 kilometers (199 miles) of the common border must be separated from Mexican allotments and assignments by not less than the distances given in Table C, which follows. When applying Table C, U.S. Class C2, C3 and B1 allotments and assignments are considered to be Class B; U.S. Class C1 allotments and assignments are considered to be Class C; also, U.S. Class A assignments operating with more than 3 kW ERP and 91 meters antenna height above average terrain (or equivalent lower ERP and higher antenna HAAT based on Annex IV of the Agreement) are considered to be Class B.

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3. 47 CFR 73.213 is amended by revising paragraphs (c) and (c)(2) to read as follows:

Section 73.213 Grandfathered short-spaced stations.

* * * * *

(c) *Short spacings involving at least one Class A allotment or authorization.* Stations that became short spaced on or after November 16, 1964 (including stations that do not meet the minimum distance separation requirements of paragraph (c)(1) of this Section and that propose to maintain or increase their existing distance separations) may be modified or relocated in accordance with paragraph (c)(1) or (c)(2) of this Section, *except that* this provision does not apply to stations that became short spaced by grant of applications filed after October 1, 1989, or filed pursuant to § 73.215. If the reference coordinates of an allotment are short spaced to an authorized facility or another allot-

ment (as a result of the revision of Section 73.207 in the Second Report and Order in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this Section only with respect to such short spacing. No other stations will be authorized pursuant to these paragraphs.

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(2) *Applications for authorization of Class A facilities greater than 3000 watts ERP and 100 meters HAAT.* Each application to operate a Class A station with an ERP and HAAT such that the reference distance would exceed 24 kilometers must contain an exhibit demonstrating the consent of the licensee of each co-channel, first, second or third adjacent channel station (for which the requirements of Section 73.207 are not met) to a grant of that application. Each such application must specify a transmitter site that meets the applicable IF-related channel distance separation requirements of Section 73.207. Applications that specify a new transmitter site which is short-spaced to an FM station other than another Class A station which is seeking a mutual increase in facilities may be granted only if no alternative fully-spaced site or less short-spaced site is available. Licensees of Class A stations seeking mutual increases in facilities need not show that a fully spaced site or less short-spaced site is available. Applications submitted pursuant to the provisions of this paragraph may be granted only if such action is consistent with the public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-139

In the Matter of

Amendment of Section 90.21 of the Commission's Rules to Provide for Higher Output Power on Certain Fire Radio Service Frequencies — RM-6711

NOTICE OF PROPOSED RULE MAKING

Adopted: May 7, 1991; Released: May 30, 1991

Comment Date: July 22, 1991
Reply Comment Date: August 6, 1991

By the Commission:

INTRODUCTION

1. The International Association of Fire Chiefs, Inc. ("IAFC") and the International Municipal Signal Association ("IMSA") have filed a petition (RM-6711) requesting amendment of the Commission's Rules to increase the maximum output power for transmitters authorized to operate on Fire Radio Service frequency 153.83 MHz. Currently, transmitters operating on this frequency are limited to a maximum of 10 watts output power. [1]

2. IAFC/IMSA state that this frequency is dedicated to Fire Radio Services and is one of a complement of frequencies utilized by fire-fighting personnel. The petitioners claim, however, that because many of the vehicular radio units operate with 100 watts output power, the 10 watt power limitation precludes necessary communications on the 153.83 MHz frequency between these vehicular units and fire-fighting personnel using lower power hand-held radio units. [2] Thus, critical communication links are lost and fire-fighting efficiency deteriorates. The petitioners further state that many Fire Radio Service applicants request and are routinely granted waivers of the 10 watt limitation so that their vehicular units can communicate with portable units operating on 153.83 MHz. No other party has filed comments regarding this petition.

DISCUSSION

3. The Commission originally limited the power available for use on 153.83 MHz so that this frequency would be used solely for the purpose of on-the-scene fire-fighting communications. [3] Increasing this power limit could open up this frequency for uses incompatible with or different from the intended purpose. Considering the relatively high power requested by IAFC/IMSA, [4] unless we specifically limit the type of use, this frequency will indeed become attractive for other than on-the-scene fire-fighting communications. It is, however, obvious that complete and efficient communication between all personnel at the scene of a fire is critical to a safe and effective fire-fighting effort. If the 10 watt power limit hampers this effectiveness, then it also defeats the original purpose of establishing this frequency. Previously, the 10 watt power limit restricted the effective range of this frequency and limited practical use to on-the-scene communications. With the power increased for this frequency, we need to explore other ways to maintain the intended primary purpose of this frequency. One such step we can take in preventing incompatible use of this frequency is to eliminate the fixed use designation from 47 C.F.R. § 90.21, thereby restricting use of this frequency to mobile operations. We request comments on this as well as other methods to prevent use of this frequency in a manner incompatible with on-the-scene fire-fighting communications.

4. An increase in power on this frequency may also require greater coordination efforts among licensees making use of this frequency at the scenes of adjacent fires. Currently, the limited range imposed by the 10 watt power restriction aids in preventing interference on this frequency. IAFC/IMSA, however, state that, as the Commission's certified frequency coordinating committee for the Fire Radio Service, they consider it their responsibility to maintain interference-free communications when both 100 watt vehicular and 10 watt hand-held units are being used at the scene of a fire. We seek comments on whether the coordination process provides adequate safeguards against interference on this frequency. We also seek comments on whether on-the-scene coordination will resolve potential interference situations. In this regard, we note that numerous applicants have requested and been granted waivers of the 10 watt limitation and we have not been apprised of any problem with those operations. For applicants to continue to prepare and the Commission to continue to process what have seemingly become routine waivers places a needless burden on both the applicants and the Commission.

5. It is imperative that the Commission's regulations adapt to allow licensees to take full advantage of advances in radio technology. In the instant case, as the power available to mobile units has increased, it is apparent that the 10 watt power limit has been outgrown and that, if these frequencies are to enhance the effectiveness of on-the-scene fire-fighting efforts, the power limit must be raised. Accordingly, we propose to amend Part 90 of the Rules to raise the maximum transmitter output power limitation on the frequency 153.83 MHz to 100 watts as

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[1] *See* 47 C.F.R. § 90.21(b) and (c)(1).
[2] IAFC/IMSA Petition at 3.
[3] Use of the frequencies 33.42 and 46.30 MHz is similarly limited in power and intended for this type of operation. While IAFC/IMSA's petition does not address a power increase for these frequencies, we note that because they are also intended for on-the-scene fire-fighting communications it is appropriate to include them in considering the issues of this proceeding.
[4] 100 watts is only 5.4 dB below the 350 watts available to other Fire Radio frequencies.

suggested by the IAFC/IMSA. We reiterate, however, our desire to maintain this frequency for its original intended purpose of on-the-scene fire-fighting communications. Accordingly, we propose to restrict this frequency to mobile use only by eliminating the fixed use designation from 47 C.F.R. § 90.21. We request comment on the appropriateness of eliminating this frequency from fixed use as well as comment on other methods of maintaining this frequency for its intended purpose. Additionally, 33.42 MHz and 46.30 MHz are intended for the same purpose as 153.83 MHz and transmitter output power on these frequencies is similarly restricted to 10 watts. We request comment on whether we should retain the 10 watt power limitation on the 33.42 MHz and 46.30 MHz frequencies or if we should modify regulations for these frequencies consistent with any changes adopted for 153.83 MHz.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for action

6. This proposal is intended to improve communications between on-the-scene fire-fighting personnel utilizing the fire radio frequencies. This will result in safer and more effective fire-fighting efforts.

Legal basis

7. Sections 4(i), 303(g), 303(r) and 303(a) of the Communications Act of 1934, as amended.

Reporting, recordkeeping, and other compliance requirements

8. None.

Federal rules which overlap, duplicate or conflict with this rule

9. None.

Description, potential impact and number of small entities involved

10. The increase in power for these fire radio frequencies will result in improved communications and safety for fire-fighting units, many of which are small local organizations. Beyond this, we are unable to quantify the potential effects on small entities. We therefore invite specific comments on this point by interested parties.

Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

11. None

PROCEDURAL MATTERS

12. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

13. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

14. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

15. Pursuant to applicable procedures set forth in 47 C.F.R. §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 22, 1991,** and reply comments on or before **August 6, 1991.** Extensions of time to file comments or replies are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

16. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

A. It is proposed to amend Part 90 of the Commission's Rules, 47 C.F.R. Part 90 to read as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Section 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 90.21 is amended by revising the entry for 153.83 in the table in paragraph (b) and by adding paragraph (c) (17) to read as follows.

§ 90.21 Fire Radio Service

* * * * *

(b) ***

Frequency or band	Class of station(s)	Limitations
* * * * *		
153.83	Mobile	17
* * * * *		

(c)***

(17) The maximum output power of any transmitter authorized to operate on this frequency shall not exceed 100 watts.

* * * * *

3. 47 C.F.R. § 90.555 is amended by revising the entry for 153.83 in the table in paragraph (b) to read as follows:

§ 90.555 Combined Frequency Listing.

* * * * *

(b)***

Frequency	Services	Special Limitations
*****		
153.830	PF	Max. Power 100 W.
* * * * *		

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

U.S. WEST PAGING, INC. — File Nos. 20794-CD-P/L-01-89 and 20821-CD-P/L-01-89

For facilities in the
Public Land Mobile Service
at Cosmopolis and Chehails,
Washington

ERRATUM

Released: May 31, 1991

The Memorandum Opinion and Order, DA 91-524, released April 19, 1991, in the above-captioned matter is hereby amended as follows:

In re Application of — File No. 20821-CD-P/L-01-89

U.S. WEST
PAGING, INC.

For facilities in the
Public Land Mobile Service
at Chehails, Washington

*****

1. U.S. West Paging, Inc. (USWP) filed the captioned application seeking authority to construct and operate a new station on frequency 152.84 MHz in the Public Land Mobile Service (PLMS) at Chehalis, Washington. A petition to deny has been filed by Aaro Communications, Inc. (Aaro). For the reasons set forth below, we dismiss the petition, and grant the application.

*****

2. On January 17, 1989, Aaro petitioned the Chief, Common Carrier Bureau to dismiss or deny the above-captioned application. Aaro alleged that USWP inaccurately represented itself as a radio common carrier (RCC), and that USWP violated Section 22.15(i)(2) of the Commission's rules because USWP failed to disclose that its affiliates own other PLMS facilities located within 40 miles of the site proposed in its application. The facilities cited were transmitters licensed to Pacific Northwest Bell Telephone Company (PNB), which like USWP is a subsidiary of US WEST, Inc. (US WEST).

3. USWP took issue with both of Aaro's allegations, contending first that it properly classified itself as an RCC, rather than a wireline common carrier (WCC), because it does not provide landline telephone service. Then USWP stated that it did not specifically list the PNB transmitters in its application because it did not believe this information was required. USWP argued that Section 22.15(i)(2) does not apply to its pending application. The rule's purpose, said USWP, is to prevent applications from circumventing the Commission's traffic loading study requirements by filing under different names. USWP surmised that information concerning PLMS stations owned by PNB was superfluous. Next, USWP said that its affiliation with PNB is a matter of record, and although USWP and PNB are both controlled by US WEST, neither subsidiary, nor any of its principals, has an interest in the other. Furthermore, said USWP, all of US WEST's BOCs are required to be entirely separate. USWP pointed out that it may not even lease space from PNB on an arms-length basis. Therefore, USWP claimed, in light of the irrelevancy of the information, it did not violate the rule. USWP nevertheless said it was amending it application to include PNB's PLMS facilities cited by Aaro.[1]

4. On February 3, 1989, USWP filed the amendment mentioned in its opposition to Aaro's petition to deny. On February 8, 1989, Aaro filed a supplement to its petition, alleging USWP violated Section 22.23(d) of the rules and the Commission's *ex parte* restrictions because if failed to formally serve Aaro with a copy of the February 3 amendment . . . .

*****

9. Having carefully considered the evidence and arguments presented, we conclude that the violations of the Commission's rules by USWP do not warrant dismissal of its application . . . .

*****

11. IT IS FURTHER ORDERED that the application of U.S. West Paging, Inc. (File No. 20821-CD-P/L-01-89) IS GRANTED.

*****

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] Copies of the proposed amendment was attached to USWP's pleading.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-394

In the Matter of

Albany Region Public Safety Plan

ORDER

Adopted: May 24, 1991; Released: May 31, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On June 1, 1990, Region 30 (Albany) submitted its Public Safety Plan to the Commission for review. Region 30 is comprised of Albany, Broome, Cayuga, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Ostego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington counties. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region. On August 20, 1990, Region 30 filed revisions to the plan, based on conversations with the Commission's staff and on April 22, 1991, the Region furnished the Commission with a list of vacant channels.

2. The Region 30 Plan was placed on Public Notice for comments, 55 FR 36701 (Sept. 6, 1990). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Region 30 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in the Albany area. We note, however, that the channel allotments contained in the Albany Plan may need to be modified to conform to the Arrangements between the United States and Canada, effective October 22, 1990, concerning use of the 821-824/866-869 MHz bands. 5 FCC Rcd 5793 (1990).

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 30 IS ACCEPTED, subject to the provisions of paragraph 3 above. Furthermore, licensing of the 821-824/866-869 MHz band in Region 30 may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

C&W COMMUNICATIONS, INC. File No. 29821-CD-P/ML-1-89

For facilities in the Public Land Mobile Service at Hot Springs, Arkansas for station WRC210

ANSWER FORT SMITH, INC. File No. 31894-CD-P/ML-1-89

For facilities in the Public Land Mobile Service at Hot Springs, Arkansas for station KNKC502

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1991; Released: May 31, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. C&W Communications, Inc. (C&W) and Answer Ft. Smith, Inc. (Answer) filed competing applications to establish Public Land Mobile Service (PLMS) facilities on frequency 158.10 MHz at Hot Springs, Arkansas. Both applicants submitted petitions to dismiss the other's application.[1] The applications were listed as electrically mutually exclusive[2] and scheduled for lottery. [3] Answer's application was listed first in the Commission's lottery conducted on April 11, 1990.[4] For the reasons discussed below, we grant Answer's application and dismiss C&W's application.

II. DISCUSSION

2. C&W contends that Answer's application is defective and must be dismissed because Answer does not have reasonable assurance of site availability.[5] C&W argues that it owns both the tower facility on which Answer has proposed to construct its antenna and the land on which the tower has been erected. C&W asserts that it never agreed either in writing or orally to make the location available to Answer. C&W concludes that Answer has falsely certified its application to the Commission because Answer misrepresented that it could avail itself of the proposed site.

3. In opposition, Answer claims, with citations, that reasonable site availability assurances may be obtained by verbal authorization from the owner of a proposed site, and that Answer received verbal assurances from C&W. Answer asserts that Answer's President, Mr. Hugh R. Jones (Jones), had previous business dealings with C&W's President, Stephen P. Gill (Gill) and Mr. Ralph Lee (Lee), a C&W principal, and that beginning around mid-1989, Jones, Gill, and Lee discussed installing a 158.10 MHz transmitter in the Hot Springs area, and possibly sharing installation and operation costs as part of Answer's existing 158.10 MHz wide-area PLMS system. Answer contends that after C&W filed its application Jones repeatedly tried to reach a mutually acceptable sharing agreement with C&W. Answer states that Jones telephoned Lee on September 15, 1989, informing Lee that Answer intended to proceed with its own application. Answer further states that on September 18, 1989, Gill and Jones agreed by telephone during a 40 minute conversation that the basic terms of a Hot Springs sharing arrangement were established, that Answer could proceed with its own 158.10 MHz application with a view toward co-licensing if a sharing agreement were finalized, and that Answer could specify C&W's site in its application. Answer says that because Jones and C&W had no further contact prior to C&W filing its petition against Answer's application, it was surprised and disturbed by C&W's allegations. According to Answer, C&W's failure to refer in its petition to the business dealings between them, including the September telephone conversations, leads it to conclude that C&W unilaterally and unexpectedly withdrew its permission for Answer to specify its site in Answer's application. This, claims Answer, required it to find another site in Hot Springs and to submit a minor amendment to its application specifying that new site.

4. In its reply, C&W states that Jones was not given any right to specify C&W's site in Answer's application or any reasonable assurance that C&W's site would be available to it. C&W further states that when Jones signed and certified Answer's application there was no shared-use agreement between the firms, and Answer's site availability representation was false, based on Gill's personal knowledge. C&W contends that it did not unilaterally withdraw its permission for Answer to specify the C&W site because no such permission was ever granted. While it acknowledges discussions with Answer regarding sharing frequency 158.10 MHz in Hot Springs, C&W again asserts that no final agreement was reached. C&W alleges that Answer specified the C&W site in its application pending location of an alternative site. C&W concludes that Answer's application must be dismissed or designated for an evidentiary hearing.

5. In its Objection to C&W's application, Answer contends that C&W's failure to disclose in its petition the September conversations between Jones and Gill Lee shows a lack of candor, indicating that C&W and its principals lack the requisite character qualifications for grant of a license. Answer claims that C&W continues its misrepresentations by denying that reasonable site-availability assurances were given during the September 18 telephone conversation. It emphasizes that Jones initiated the September conversations with C&W to obtain site availability assurance, was aware of the need for site assurance, and had no motive to specify the site in its application unless it had such assurance. Answer also claims that C&W intended to renege so it could attack Answer's application and eliminate it as a competitor. In response, C&W argues that Answer has not established a *prima facie* case that C&W lacked candor or misrepresented facts to the Commission.[6] It asserts that its version of the events has been verified by two declarants, and that Answer has not established any motive for C&W to renege on the grant of site access to Answer. C&W asserts that Answer's

Objection is an attempt to have "another bite at the apple" and to put C&W's application in a contested mode.

6. The essential question before us is whether Answer has reasonable assurance of a site in support of its application for a PLMS facility on frequency 158.10 MHz at Hot Spring, Arkansas, as required by Section 22.15(a)(1) of the rules. If the site amendment filed by Answer after the application cutoff date is properly classifiable as minor under the rules and is otherwise lawfully acceptable,[7] the various arguments raised by C&W concerning the availability of the original site are moot.[8] Therefore, we will first determine whether Answer's amendment is minor, and then whether there are any restrictions which would prevent the new site from satisfying the requirement of Section 22.15(a)(1).

7. Under Section 22.23(c)(2) of the rules, a site amendment is minor if it does not enlarge the reliable service area of the proposed base station facilities by more than one mile along any of eight radials spaced every forty-five degrees from zero degree True North. It is uncontroverted that the location of the site contained in Answer's amendment is within the definition of Section 22.23(c)(2).[9] The site amendment is therefore minor. We now turn to the question concerning the acceptability of the minor amendment.

8. In *Allen C. Moore d / b / a Moore's Service*, 86 FCC 2d 787 (1981) (Moore), the Common Carrier Bureau (Bureau) addressed whether a defective mutually exclusive application should be returned if the applicant submits a post cutoff amendment that cures the defect. The Bureau stated that

> A literal reading of the cutoff rule suggests that the application should be returned because it was in a condition unacceptable for filing on the cutoff date. However, we believe that, as a matter of policy, a properly filed amendment should be included in our evaluation of a pending application. Our prescreening procedures were designed to reject unacceptable applications. Where a defect is overlooked at prescreening and cured before processing, neither our prescreening nor our processing functions will be seriously affected by our consideration of the application as amended. [footnote omitted] Accordingly, a defective mutually exclusive application that has not been returned and that is cured by a post cutoff amendment will be retained on file and be given comparative consideration.

Id. at 795-96. At n. 17, the Commission added, "It should be noted, however, that certain amendments may be 'major' and may therefore cause the application to be treated as newly filed and thus cut off from comparative consideration." [rule citations omitted] In the instant case, however, Answer's site amendment is minor. Moreover, we need not conclude that Answer's original application was defective when filed because we find that the subsequent minor amendment Answer submitted corrects the purported defect.[10] We conclude, therefore, that Answer's application as amended contains reasonable assurance of a site as required by Section 22.15(a)(1) of the rules.

III. CONCLUSION

9. In view of the foregoing, the result of the April 11, 1990 lottery, which ranked Answer's application first, and our review of Answer's application, we find that grant of Answer's application as amended for frequency 158.10 MHz at Hot Springs, Arkansas will serve the public interest, convenience and necessity. We also find no merit to C&W's arguments regarding Answer's site showing or allegations of misrepresentation before the Commission.

IV. ORDERING PARAGRAPHS

10. Accordingly, IT IS ORDERED THAT the captioned application, as amended, filed by Answer Fort Smith, Inc., File No. 31894-CD-P/ML-1-89, IS GRANTED.

11. IT IS FURTHER ORDERED THAT the Petition to Dismiss filed by C&W Communications, Inc. against the captioned application of Answer Fort Smith, Inc. IS DENIED.

12. IT IS FURTHER ORDERED THAT the captioned application of C&W Communications, Inc., File No. 29821-CD-P/ML-1-89, IS DISMISSED and that the Section 1.41 Request for Dismissal filed by Answer Fort Smith, Inc. IS GRANTED TO THE EXTENT INDICATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Answer submitted a "Section 1.41 Request for Dismissal" (Objection) against C&W's application. Section 1.41 of the Commission's rules provides that, except where formal procedures are required, requests for action may be submitted informally.

[2] *See Public Notice*, Rpt. No. PMS-90-17, Mimeo No. 1392 (released Jan. 24, 1990). Section 22.31(b) of the Commission's rules provides in relevant part that a mutually exclusive application will be entitled to comparative consideration if it is filed within 60 days after the public notice listing the earlier conflicting application accepted for filing. C&W's application was listed as accepted for filing by *Public Notice*, Rpt. No. PMS-89-43 (released July 26, 1989). Answer filed its application on September 22, 1989.

[3] *See Lottery Notice*, PMS-35-4, Mimeo No. 2060 (released Mar. 6, 1990).

[4] *See Public Notice*, Case No. PMS-35-4 (released Apr. 13, 1990). Subsequently, *Public Notice*, Rpt. No. 90-31A, Mimeo No. 2951 (released May 2, 1990), listed C&W's application as dismissed and Answer's application as granted. Because C&W's petition was never addressed, the dismissal and grant were set aside. *See Public Notice*, Rpt. No. PMS-90-33-A, Mimeo No. 3188 (released May 16, 1990).

[5] Section 22.15(a)(1) of the Commission's rules provides: "The applicant shall have obtained reasonable assurance that it can use the site."

[6] Answer has filed a motion to strike C&W's response to Answer's Objection. In view of our decision herein, Answer's motion is moot.

[7] Answer's amendment was filed on November 28, 1989, about two months after the cutoff date.

[8] While C&W alleges that Answer has misrepresented site availability in its application before the Commission, we cannot conclude from the record that there is sufficient evidence tending to show an intent to deceive. *See* Riverside Broadcasting Co., Inc., 53 Rad. Reg. 2d 1154, 1157 (1983); *see also* Fresno Cellular Telephone Company, FCC 85-550 (released Oct. 17, 1985). Nor can we conclude that Answer did not have reason to believe it could refer to C&W's site in its application. In any event, the misunderstanding was subsequently corrected by amendment.

[9] The new site actually decreases the reliable service area proposed in the original application.

[10] *Cf., e.g.*, Classic Vision, Inc., 104 FCC Rcd 2376 (1987), and Port Huron Family Radio, 66 Rad. Reg. 2d (P&F) 545, 549 (Rev. Bd. 1989), which are inapposite because the applicants had no colorable site claims.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-337
Phase II

In the Matter of

Regulation of International
Accounting Rates

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: May 9, 1991; Released: May 23, 1991

Comment Date: August 16, 1991
Reply Comment Date: September 27, 1991

By the Commission: Chairman Sikes issuing a separate statement.

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Appendix A Countries that form the Europe Region
Appendix B Countries that form the Asia Region
Appendix C Settlement Payments and Accounting Rate Data, 1985-1991
Appendix D Procedural Matters

I. INTRODUCTION

1. In this *Further Notice of Proposed Rule Making* (*Further Notice*), we conclude that we must continue our regulatory oversight of international settlement arrangements and take additional steps in order to move toward lower, more economically efficient, cost-based accounting and collection rates for service to and from the United States. Thus, in this *Further Notice* we: (1) direct the Common Carrier Bureau to carry out a study of international calling prices and report to this Commission on what, if any, further action should be considered to reduce international calling prices to and from the United States; (2) propose to require that carriers report their progress in negotiating accounting rate reductions for Asia and Europe by January 1, 1993; (3) propose to develop additional data and an analytical framework for assessing the instances in which there has been insufficient progress with particular countries so that we are prepared to take additional regulatory action, as required, including the possibility of preparing a list of the most egregious cases where significant problems continue; and (4) propose to provide for the unlimited resale and shared use of U.S. international telecommunications services. We believe that these actions and proposals will help us identify problem situations where, as stated in the *Notice of Proposed Rule Making* (*Notice*), [1] we would most likely initiate further regulatory action to ensure that U.S. consumers are not forced to continue to pay unreasonable or discriminatory charges to foreign administrations, and to ensure that U.S. consumers enjoy lower, more cost-based, international calling prices.

II. BACKGROUND

2. For more than fifty years, the Commission has regulated international settlement arrangements through a policy requiring uniformity for U.S. international carriers on parallel international routes. Only recently did the Commission begin to focus on the absolute level of international accounting rates and adopt a *Notice* to modify the Commission's International Settlements Policy (ISP) to promote lower, more economically efficient, cost-based international accounting and collection rates for the provision of telecommunications services to and from the United States.

3. In the *Notice*, however, we also observed that the Communications Act provides us with broad authority to regulate U.S. carriers' provision of international telecommunications services. We tentatively concluded that we have the authority to establish international accounting rates, to determine and prescribe just and reasonable accounting rates, and, if necessary, to condition Section 214 authorizations on the implementation of lower, more cost-based, accounting rates. We also tentatively concluded that we would be most likely to exercise this authority only in situations in which: (1) a foreign telecommunications administration maintains a large dissymetry in calling prices with the United States; (2) a foreign telecommunications administration maintains accounting rates with the United States that ignore relevant cost trends; or (3) a foreign telecommunications administration seeks to evade our ISP, perhaps by permitting "one-way" resale.

4. To provide a more detailed basis for our analysis, we invited parties to provide information on the average total cost of providing different telecommunications services between the United States and other countries and the extent to which Articles 6.1[2] and 6.2 [3] of the International Telecommunication Regulations (ITU Regulations) could serve as the basis for seeking bilateral collection and accounting rate reductions between the United States and other International Telecommunication Union (ITU) member countries. In addition, we invited parties to comment whether lifting restrictions on international resale of U.S. telecommunications facilities and services would result in lower, more cost-based, international accounting and collection rates. Finally, we invited parties to comment on the procedural and substantive implications of

our tentative conclusions and any legal and policy issues associated with exercising our authority in this area. In particular, we sought the views of the Executive Branch on any potential foreign policy, trade, commercial, or other implications of proposed regulatory actions and the most appropriate mechanism to ensure that the views of the Executive Branch agencies would be fully considered.

III. DISCUSSION

5. In an accompanying *Report and Order*,[4] we have adopted the three-part ISP reform proposed in the *Notice*. The introduction of an ISP notification option and the adoption of a revised ISP waiver option remove U.S. regulatory impediments to lower, more economically efficient, cost-based, international accounting rates. In addition, the *Report and Order* demonstrates our commitment to pursuing meaningful reform at the international level by recommending that U.S. delegations to Study Group III of the International Telegraph and Telephone Consultative Committee (CCITT) of the ITU seek certain revisions in existing, and proposed, CCITT Recommendations. The *Report and Order* also directs U.S. carriers to negotiate lower, more economically efficient, cost-based accounting rates with their foreign correspondents, initially focusing on Asia and Europe.

6. We recognize, however, that while U.S. efforts to reduce accounting rates since the release of the *Notice* will save U.S. carriers $85 million annually, this "savings," which is in reality only a diminution in the growth of the outpayments deficit, pales in comparison with the total U.S. settlements deficit, which is approaching $3 billion annually. Therefore, while we are optimistic that U.S. carriers will be able to negotiate significantly lower cost-based accounting rates in accordance with international law, we are not prepared to conclude that the U.S. public interest is being served when, despite sustained U.S. carrier efforts and U.S. government encouragement, the weighted average International Message Telephone Service (IMTS) accounting rate has dropped only a few pennies, to a level that, by any reasonable measure, is still clearly significantly above the cost of providing international telephone service.

7. Therefore, should U.S. carriers be unsuccessful in their efforts to negotiate lower accounting rates, we believe that we must be prepared to take further regulatory action. As recent events in the Persian Gulf have made clear, international telephone calls play an increasingly vital role in the daily lives of Americans both at home and abroad, and underscore the need to be in a position to take action to remove impediments to cost-based international calling rates.[5] We do not believe that the U.S. public interest is served when the lack of progress on reducing international accounting rates prevents U.S. carriers from lowering international calling prices and results in U.S. consumers making an estimated $1 billion overpayment for international telephone calls.[6] While we take some solace from knowing that U.S. customers pay less for their international calls in general than do their foreign counterparts calling to the United States, we believe that U.S. calling prices are not as low as they should be. Furthermore, we believe that the above-cost charges that U.S. carriers must pay to other countries to terminate U.S.-originated calls represent a substantial hindrance to achieving needed reductions.

A. International Calling Prices

8. In the *Notice* we observed that calling prices from the United States to a foreign country are often significantly lower than foreign calling prices to the United States.[7] We also observed that U.S. international calling prices are substantially higher than U.S. domestic calling prices.[8] In this *Further Notice* we believe that we must assess whether there is a systemic problem with international calling prices, and if so, determine whether any further regulatory proposals might be necessary. In particular, we are concerned that, absent international reform regarding international calling prices, U.S. consumers may not be afforded lower international calling rates for the foreseeable future.

9. The ITU Regulations impose a responsibility to try to avoid "too great a dissymetry" between the charges applicable in each direction of the same relation.[9] Absent reductions in foreign calling prices to the United States, other countries might argue that further calling price reductions by U.S. carriers would increase the dissymetry. We cannot conclude, however, that the appropriate U.S. regulatory response in this situation is to wait for foreign consumers to insist upon calling price reductions for service to the United States.[10] We note, for example, that despite the fact that CCITT Recommendations recognize the desirability of providing for reduced calling prices for "periods of light traffic in the international telephone service,"[11] many countries have never implemented reduced calling prices for service to the United States that occurs during light, or "off-peak," traffic periods. Moreover, we note that there is information in the record that suggests that foreign consumers may pay substantially higher prices to call the United States than to call other countries.[12]

10. We recognize that to make an informed assessment, we need to obtain more comprehensive and up-to-date information. As a result, we direct the Common Carrier Bureau to study international calling prices and provide a report to this Commission. We recognize that this Bureau effort will be a substantial undertaking. We believe, however, that this information will be an important part of our regulatory analysis and ask that parties assist this effort by submitting information on foreign calling prices. This could include information on either domestic calling prices in a foreign country or international calling prices.[13] We wish to make clear that we would welcome information from individual or corporate users, even where it relates to prices in only one foreign country. We also would welcome the assistance of the Executive Branch agencies that have representatives in other countries that could assist the Bureau in developing this international calling price data base. We invite parties to comment on this approach and to provide any information that would assist our efforts. We also invite parties to comment on what, if any, further regulatory actions this Commission should propose to reduce international calling prices, including seeking action at the international level either within the CCITT or the Organization for Economic Co-operation and Development (OECD).

B. International Accounting Rates

11. In the *Notice*, we tentatively concluded that U.S. carriers are paying charges well above cost to a large number of foreign telecommunications administrations to terminate U.S.-originated telephone calls. We affirm this conclusion for several reasons. First, there is little, if any,

serious disagreement in the record with our assessment that U.S. IMTS accounting rates are above-cost. Second, U.S. IMTS accounting rates with Canada suggest that other developed countries may profitably terminate U.S.-originated telephone calls at rates far lower than the existing charges that U.S. carriers generally must pay to terminate U.S.-originated telephone calls elsewhere. Finally, the average U.S. IMTS accounting rate with the fifty top recipients of U.S. net settlements payments is substantially above the average weighted U.S. IMTS accounting rate.[14]

12. In the *Notice*, we also tentatively concluded that we have the authority to establish accounting rates used by U.S. carriers. We affirm this conclusion based on clear support in the record that we have the authority under Sections 201(a),[15] 201(b),[16] and 205,[17] of the Communications Act, and relevant case law, to establish maximum rates for an entire service and to require that carriers cease and desist from charging, collecting and receiving, or participating in charges above a maximum rate, even though a portion of that service is rendered outside the United States.[18]

13. Should further regulatory action be necessary, however, we believe that it will be particularly important to balance providing for "Nation-wide, and world-wide wire and radio communication service with adequate facilities" and doing so "at reasonable charges."[19] A number of parties in this proceeding emphasize, for example, the importance of U.S. settlement payments for telecommunications infrastructure development.[20] On the other hand, others have a concern that the U.S. ratepayer not be responsible for foreign aid simply by making an international telephone call.[21] As a result, we believe that NTIA is correct in stating that there are a "host of complex factors" involved and that there is a pressing need for better information, particularly with regard to certain regions of the world.

14. In the accompanying *Report and Order*, we have directed U.S. carriers to negotiate lower more cost-based accounting rates with their foreign correspondents, particularly focusing on Asia and Europe. Specifically, we have made clear our view, based on the information now before us, that U.S. carriers should be paying approximately half current rates, or at most between 0.275 Special Drawing Rights (SDRs)[22] to 0.42 SDRs ($0.39 -$0.60) to terminate U.S. telephone calls in Asia[23] and between 0.165 SDRs to 0.275 SDRs ($0.23 -$0.39) per minute to terminate U.S. telephone calls in Europe.[24] Moreover, we have made clear our view that we recognize that reliable cost information is difficult to obtain and we therefore cannot state, with certainty, that these benchmark estimates provide a definitive basis on which to make our policy judgments. Nevertheless, we believe that these estimates are both reasonable and conservative.[25]

15. We recognize, however, that not all countries in Asia and Europe have the same cost characteristics and that we simply do not have reliable cost information or cost surrogates for Latin America and Africa.[26] We understand that the question of providing cost estimates for developing countries raises broader international infrastructure issues, including the need to extend service to new areas and to provide for higher call completion, and whether international calling revenues should be used to assist in such development. The interest of U.S. consumers and U.S. firms in achieving a high quality international infrastructure is a relevant consideration in this proceeding. Call completion and service development have become important to U.S. firms competing in the global economy. Of particular importance in providing cost estimates is the need to consider the differing state of infrastructure in developing countries, including potentially higher costs resulting from sub-standard levels of modernization or external debt.[27] In this context, we invite parties to comment on our proposed estimates for Asia and Europe, including the need to differentiate among differing countries within each region. We also invite parties to comment on an analytical framework for establishing reasonable estimates for Latin America and Africa to aid in our analysis of this issue.[28]

16. Therefore, while we believe that it would be premature to propose additional regulatory actions in this *Further Notice* to establish the maximum rate that U.S. carriers may pay to terminate U.S.-originated telephone calls, we believe that it is particularly important that parties comment on the development of an analytical framework for assessing the instances in which there has been insufficient progress with particular countries. In this *Further Notice* we propose to require that U.S. carriers report their progress in negotiating accounting rate reductions by January 1, 1993 with Asia and Europe. We invite parties to comment on this proposed report, including the information that should be included in these reports to enable us to determine whether sufficient progress has been made. Moreover, we invite parties to comment on the possibility of preparing a list of the most egregious cases where significant problems continue. In this context, we invite parties to comment whether we have sufficient information in the record with regard to the maximum rates U.S. carriers should pay to terminate U.S. telephone calls in Asia and Europe for us to consider additional regulatory action at a later date, and what additional proceedings would help us conclude whether U.S. carrier payments above these estimated rates could be considered unjust and unreasonable. We also invite parties to comment on alternative regulatory actions we should consider proposing should U.S. carriers be unsuccessful in their efforts to negotiate lower more cost-based accounting rates with their foreign correspondents. We invite parties to comment on proposals, such as conditioning Section 214 authorizations[29] to U.S. international common carriers,[30] to ensure nondiscriminatory treatment of U.S. carriers serving a given country. Specifically, we seek comment on the desireability of conditioning Section 214 authorizations of U.S international carriers that seek to serve a foreign country in which that carrier has an ownership interest or sufficiently close corporate relation with a carrier that either holds some form of privileged access to that country or otherwise has market power.

C. International Resale

17. In the *Notice* we made clear our concern that the continuation of existing resale restrictions for international private line and international telephone services permit telecommunications administrations to ignore cost trends that would otherwise result in lower, more economically efficient, cost-based, international accounting rates and calling prices. Moreover, we noted that while the Commission permits, but has not prescribed international resale, the Commission has not taken action on an earlier proposal[31] to prescribe such resale. In view of the stale record in CC Docket No. 80-176, we propose

herein considering anew the elimination of any remaining U.S. carrier restrictions for the international resale of telecommunications facilities and services. Consequently, in this *Further Notice* we delegate authority to the Common Carrier Bureau to terminate CC Docket 80-176.

18. While many other countries have preferred to continue restrictions on international resale, we are encouraged by movement by some countries towards permitting international resale and by the unanimous decision of CCITT Study Group III to apply the accelerated approval procedure of CCITT Resolution No. 2 to a revised CCITT Recommendation D.1.[32] We also continue to be concerned, however, that some countries might seek to unilaterally evade the provisions of our ISP, which are designed to ensure nondiscriminatory treatment of all U.S. carriers. As a result, we invite parties to comment how we may realize full advantage of the CCITT's efforts to provide a revised, more liberal, Recommendation D.1, while limiting the opportunity for exclusive arrangements that would discriminate against competing U.S. carriers. Specifically, we invite comment whether we should now require, as a matter of U.S. law, unlimited resale and shared use for all U.S. carrier-provided international telecommunications services, including international private line service, for all countries.[33] We also invite parties to comment on a more cautious, alternative approach that would require that U.S. carriers permit unlimited resale only to those countries, such as Canada, the United Kingdom, Sweden, and Australia, that are in the process of implementing cost-based international accounting rates and more liberal telecommunications regimes, including permitting or requiring resale of international private line and international telephone services.[34]

IV. CONCLUSION

19. In this *Further Notice* we tentatively conclude that the U.S. public interest requires further changes in U.S. regulation of international settlement arrangements. Therefore, we have outlined additional regulatory action to provide for lower, more economically efficient, cost-based international accounting and collection rates. We request comments on the issues and proposals addressed in this *Further Notice* and encourage full participation of U.S. carriers, users, and foreign interests.

V. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above, and that COMMENT IS SOUGHT on these proposals.[35]

21. IT IS FURTHER ORDERED that the Common Carrier Bureau is delegated authority to terminate CC Docket 80-176.

22. For further information on this item contact Michael Mandigo Attorney/Advisor, International Policy Division, Common Carrier Bureau, (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Regulation of International Accounting Rates, 5 FCC Rcd 4948 (1990).

[2] Article 6.1.1 states that:

> Each administration* shall, subject to applicable national law, establish the charges to be collected from its customers. The level of these charges is a national matter; however, in establishing these charges, administrations* should try to avoid too great a dissymetry between the charges applicable in each direction of the same relation.
>
> * or recognized private operating agency

See Article 6.1.1., The International Telecommunication Regulations, Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, Australia (November 28 to December 9, 1988).

[3] Article 6.2.1 states that:

> For each applicable service in a given relation, administrations* shall by mutual agreement establish and revise accounting rates to be applied between them, in accordance with the provision of Appendix 1 and taking into account relevant CCITT Recommendations and relevant cost trends.
>
> * or recognized private operating agency

Article 6.2.1., *Id.*

[4] Regulation of International Accounting Rates, *Phase I Report and Order*, CC Docket 90-337 (adopted May 9, 1991).

[5] *See* "FCC Details Efforts to Lower Telephone Rates from Saudi Arabia; Billing and Collection Practices of Local Carriers Examined," FCC News Release, February 21, 1991.

[6] *See* "International Accounting Rates and the Balance of Payments Deficit in Telecommunications Services", Report of the Common Carrier Bureau to the FCC (December 12, 1988); "The Balance of Payments Deficit in International Telecommunications Services", Industry Analysis Division, Common Carrier Bureau (December 12, 1988).

[7] In 1988, for example, the average price for a foreign-originated telephone call to the United States, based on a limited survey, was approximately $1.70, while the average U.S. calling price was $1.20. *See Notice* at n. 26.

[8] *Id.* at n. 24.

[9] *See supra* note 2. *See also* NTIA Comments at 22-23; API Comments at 4.

[10] We are encouraged that CCITT Recommendations already recognize the potential for "adverse reactions" from subscribers should they be treated less favorably than others. *See, e.g.*, Charging in Automatic International Telephone Service, CCITT Recommendation D. 101, approved by Special Assembly of the CCITT in 1958, modified by the CCITT Secretariat in 1973.

[11] Introduction of Reduced Rates During Periods of Light Traffic in the International Telephone Service, CCITT Recommendation D. 106 (Geneva, 1972).

[12] API Comments at 5.

[13] By international calling prices, we mean calling prices to the United States or to other countries. We ask that parties submit any relevant pricing information, but with particular focus on submitting pricing data for direct dial, station-to-station and operator assisted telephone calls by calling period (*e.g.* day, evening, night).

[14] The unweighted average IMTS accounting rate with the top fifty recipients of U.S. settlements payments is $1.77, while the weighted average IMTS accounting rate with all countries is $1.32. *See* Appendix C.

[15] Section 201 (a) provides the Commission with authority, should "such action be necessary or desirable in the public interest . . .," " to establish through routes and charges applicable thereto . . . ." *See* 47 U.S.C. § 201(a).

[16] Section 201(b) provides that "[i]t shall be the duty of every common carrier engaged in interstate or foreign commerce" to furnish communication service upon reasonable request, that "[a]ll charges . . . shall be just and reasonable . . . " and that any charge "that is unjust or unreasonable is hereby declared to be unlawful . . . ." *See* 47 U.S.C. § 201(b).

[17] Section 205 provides that should the Commission be of the opinion that any charge or practice is in violation of the Act, "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum . . . charge . . . to be thereafter observed . . . and what classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed . . . ." *See* 47 U.S.C. § 205.

[18] *See RCA Communications v. United States*, 43 F. Supp. 851, 854 (D.C.N.Y. 1942).

[19] 47 U.S.C. Section 151.

[20] *See, e.g.*, Telecommunications Regional Association of Central America (COMTELCA) Comments at 1-2; Hispano American Association of Research Centers and Telecommunications Companies (ACHIET) Comments at 2-3.

[21] *See* Telepuerto San Isidro, S.A. d/b/a/ TRICOM (TRICOM) Reply Comments at 3.

[22] An SDR is a basket of currencies established by the International Monetary Fund. In December, 1990, an SDR was worth approximately $1.42. International Monetary Fund, *International Financial Statistics*; Economic Report of the President, Table B-106 (February 1991).

[23] These estimates are are in the range of current U.S. IMTS accounting rate with Australia and Singapore. The U.S.-Australia IMTS accounting rate is 0.80 SDRs ($1.14). The U.S. IMTS accounting rate with Singapore is 0.68 SDRs ($0.97). Moreover, these estimates are slightly higher than the estimates for Europe to address any additional costs associated with providing telephone service to the Asia region.

[24] These estimates are consistent with recently agreed U.S.-Europe intercontinental accounting rates with Sweden and the United Kingdom. The U.S.-Sweden IMTS accounting rate is 0.50 SDRs ($0.71) per minute. British Telecom and Mercury have agreed to a reduction of U.S.-U.K. IMTS accounting rates to between 0.40 and 0.45 SDRs ($0.57 - $0.64) per minute by early 1993. *See* File Nos. USP-91-(N)-001,004, 005, 057, 060, 073, and 094.

[25] *See* discussion at paragraphs 24 - 26 in accompanying *Report and Order*.

[26] *See* "General Plan for the Develpment of the Interregional Telecommunication Network," CCITT-CCIR (1988), for a list of the CCITT countries in the Latin America and Africa regions.

[27] The issues that may affect the cost of providing telephone service in the developing countries, for example, might include: the degree of telephone penetration, both rural and urban; international oversight of infrastructure development plans; the relative importance of local, long distance and international traffic; and the distribution of international settlements payments.

[28] In the *Report and Order* we have required that U.S. carriers continue to comply with the traditional ISP principle of nondiscriminatory or proportionate allocation of return traffic. In this *Further Notice* we are prepared to consider, however, new proposals that propose to depart from traditional settlement principles, should parties be able to demonstrate that such proposals would better serve the public interest. As a result, we invite comment on proposals to depart from the traditional 50/50 division of tolls on the basis of cost. *See, e. g.*, Follow-up Study of the Costs of Providing and Operating International Telephone Service Between Industrialised and Developing Countries, International Telecommunication Union (Geneva, 1990). *See also* NTS Comments. We also seek comment on proposals to reallocate return traffic to serve the infrastructure needs of developing countries. *See* Letter from Gertrude J. White and Robert J. Aamoth, Counsel for Atlantic Tele-Network, Inc. to Richard M. Firestone, Chief, Common Carrier Bureau, FCC (February 12, 1991).

[29] Similarly, we believe that the record clearly supports our conclusion that Section 214 gives us authority to grant certificates to construct or operate facilities and to "attach to the issuance of such certificate such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(a).

[30] In this context, U.S. international common carriers would include all carriers, domestic- or foreign-owned, that seek or hold Section 214 authorizations from this Commission.

[31] Notice of Proposed Rule Making, CC Docket 80-176, 77 FCC 2d 831 (1980).

[32] Moreover, we are encouraged that the revised D.1 provides for the interconnection of international private lines with public networks "if agreed between the Members concerned." *See* Report R. 14, Study Group III - CCITT Secretariat (December 1990).

[33] In this context, we wish to make clear that we will not permit U.S. carrier operating agreements to apply foreign resale prohibitions in the United States. Specifically, we propose to direct the Common Carrier Bureau to monitor U.S. carrier operating agreements with their foreign correspondents and to use appropriate procedural opportunities to declare null and void any language in operating agreements with U.S. carriers relating to such a requirement.

[34] We also invite parties to comment whether we should continue to require only the filing of carrier operating agreements, or whether we should, as AT&T suggests, extend this filing requirement to all international private line interconnection arrangements.

[35] This action is taken pursuant to Sections 1, 4, 201-205, 211, 214, 215, 218-220, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 211, 214, 215, 218-220, and 303.

APPENDIX A

Countries that form the Europe Region

(derived from "General Plan for the Development of the Interregional Telecommunication Network," CCITT-CCIR (1988))

Albania
Andorra
Austria
Belgium
Bulgaria
Cyprus
Czechoslovakia
Denmark
France
Finland
Germany
Gibraltar
Greece
Greenland
Hungary
Iceland
Italy
Ireland
Liechtenstein
Luxembourg
Monaco
Netherlands
Norway
Poland
Portugal
San Marino
Soviet Union
Spain
Sweden
Turkey
United Kingdom
Yugoslavia

APPENDIX B

Countries that form the Asia Region

(derived from "General Plan for the Development of the Interregional Telecommunication Network," CCITT-CCIR (1988))

Afghanistan
Australia
Bangladesh
Bahrain
Burma
Brunei
China
Cook Islands
Fiji
French Polynesia
Hong Kong
India
Indonesia
Iran
Iraq
Israel
Japan
Jordan
Kampuchea
Kiribati
Korea
People's Republic of Korea
Kuwait
People's Democratic Republic of Lao
Lebanon
Macao
Malaysia
Maldives
Mongolian People's Republic
New Caledonia and Dependencies
Nepal
Nauru
New Zealand
Oman
Pakistan
Philippines
Papua New Guinea
Qatar
Saudi Arabia
Solomon Islands
American Samoa
Western Samoa
Singapore
Sri Lanka
Syria
Taiwan
Thailand
Tonga
Tuvalu
United Arab Emirates
Viet Nam
Vanuatu
Wallis and Futuna Islands
Yemen

APPENDIX C

SETTLEMENT PAYMENTS AND ACCOUNTING RATE DATA, 1985-1991
(50 Countries with Largest Settlement Payments)

Country	Settlement Payments, 1989 (millions)	Annual Growth in Settlements 1985-1989	Accounting Rate in 1991
Mexico 1/	$533.9	24.5%	$1.32
West Germany	167.2	31.8	1.2 SDR ($1.71)
Philippines 2/	114.8	16.1	$1.85/1.50
South Korea	111.6	11.6	$1.90
Japan	78.5	10.4	1.34 SDR ($1.91)
Dominican Rep. 3/	75.2	33.1	$1.39/0.60
Colombia	70.9	17.4	$1.75
Italy 4/	69.5	23.3	4.6/3.67 GF ($2.14/1.71)
Israel 5/	57.4	9.5	$2.40/2.10/1.90
U.K. 6/	46.2	52.8	$1.06/0.76&0.53 SDR ($.75)
Taiwan	45.0	11.9	$1.80
Brazil	43.7	19.5	$1.60
El Salvador	42.6	24.6	$1.50
Pakistan	40.1	32.8	$2.30
Peru 7/	40.0	18.9	$2.00/1.20
Poland	36.2	23.0	$1.50
Ecuador	34.8	22.2	$1.70
France 8/	32.9	19.5	1.0/0.8 SDR ($1.42/1.14)
Jamaica 9/	32.6	19.5	$1.60/1.40
Guatemala	32.4	34.7	$1.50
Greece	30.2	17.9	5.0 GF ($2.32)
Thailand	30.2	17.9	$2.00
China	26.4	64.5	8.0 GF ($3.72)
Trinidad & Tobago	23.9	30.8	$1.65
Haiti	23.1	8.1	$1.40
Spain 10/	22.9	18.5	1.6/1.2 SDR ($2.28/1.71)
Egypt	21.3	10.0	$1.90
Iran 11/	20.8	13.4	$3.00/2.50
Argentina	19.7	18.8	$1.85
Portugal	17.2	23.5	1.31 SDR ($1.86)
Panama	16.6	33.8	$1.30
Ireland 12/	16.5	12.5	$1.27/1.06
Indonesia	14.7	19.0	$2.75
Turkey	14.3	21.5	$2.00
Hong Kong	14.1	5.2	$2.20
India	13.8	-3.1	$2.25
Cuba	13.7	2.2	$1.20
Nicaragua	12.9	31.0	$1.50
Yugoslavia	12.5	1.2	1.47 SDR ($2.09)

Honduras	$12.1	33.8%	$1.50
Malaysia	12.1	6.7	$2.00
Belgium	11.9	61.0	1.2 SDR ($1.71)
Costa Rica	11.3	18.5	$1.50
Saudi Arabia	11.2	11.5	$2.10
Switzerland	10.8	12.6	1.12 SDR ($1.59)
Chile 13/	10.3	9.4	$1.70/1.20
Barbados	9.8	14.3	$1.40
Bolivia	8.5	12.4	$1.78
Romania	8.4	3.4	$2.00
Jordan	7.9	20.6	$1.50

Settlement Payments to Top 50 Countries in 1989: $2.2 billion.
Total IMTS Settlement Payments in 1989: $2.4 billion.
Top 50 Payments as a Percent of Total Payments: 92%.
Average Accounting Rate of Top 50 in 1991: $1.77.

Footnotes

1. Accounting rates for IMTS between the United States and Mexico vary by service classification and location in both countries. The rate shown here is a simple average of all the accounting rates in effect for IMTS between the United States and Mexico in 1990.
2. A growth-based accounting rate is used for service with the Philippines.
3. A full and reduced accounting rate structure is used for service with the Dominican Republic.
4. A growth-based accounting rate is used for service with Italy.
5. A full and reduced accounting rate structure is used for service with Israel.
6. A full and reduced accounting rate structure is used for service with BTI with the United Kingdom and a single accounting rate is used for service with Mercury.
7. A growth-based accounting rate is used for service with Peru.
8. A full and reduced accounting rate structure is used for service with France.
9. A growth-based accounting rate is used for service with Jamaica.
10. A full and reduced accounting rate structure is used for service with Spain.
11. A growth-based accounting rate is used for service with Iran.
12. A full and reduced accounting rate structure is used for service with Ireland.
13. A full and reduced accounting rate structure is used for service with Chile.

APPENDIX D

Procedural Matters

Ex Parte Rules - Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

Initial Regulatory Flexibility Act

Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding additional regulatory actions proposed to provide for lower, more economically efficient, cost-based international accounting and collection rates, including: directing the Common Carrier Bureau to conduct a study of international calling prices; requiring carriers to report their progress in negotiating accounting rate reductions; proposing to develop additional data and an analytical framework for assessing instances where there has been insufficient progress and possibly preparing a list of the most egregious cases where significant problemc continue; and developing an analytical framework for a cost analysis for the provision of service between the United States and developing countries; requiring unlimited resale and shared use of U.S. international telecommunications services; and considering additional regulatory action, if necessary, to address continuing problems.

Objectives

The Commission seeks to evaluate additional regulatory action to provide for lower, more economically efficient, cost-based accounting and collection rates to maximize the development of a competitive international telecommunications marketplace that best serves the public interest.

Legal Basis

The proposed action is authorized under sections 1, 4, 201-205, 211, 214, 215, 218-220, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 211, 214, 215, 218-220, and 303.

Reporting, Recordkeeping and Other Compliance Requirements

The actions contained in this Further Notice may affect large and small carriers. These carriers may be required to comply with the proposed requirement to file certain reports, but this is not estimated to be a significant economic burden for these entities.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

The proposals discussed in this Further Notice will primarily effect the large U.S. international telecommunications service providers. In light of the positive marketplace effects that we believe will result from our proposals, through lower accounting and collection rates for international telecommunications services, the successful implementation of our proposed approach should facilitate the entry of additional carriers into the international marketplace, including small carriers, and should permit small entities greater flexibility in the international marketplace. Copies of this Notice will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Further Notice solicits comments on a variety of alternatives.

Paperwork Reduction

We recognize that the proposals suggestd include the possibility of certain new reporting requirements and, therefore, implementation of any such requirements may be subject to review by the Office of Management and Budget (OMB). Copies of this Notice will be sent to OMB.

Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before August 16, 1991, and reply comments on or before September 27, 1991. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. you should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M St., N. W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

Statement of FCC Chairman Alfred C. Sikes Regarding the Commission's Companion International Settlements & Accounting Rates Decisions (CC Dockets 90-337, Phases I and II)

Foreword

International telecommunications routinely generates statistical superlatives. Between 1956 and 1988, for example, the cost per voice path via transatlantic cable fell from about $557,000 to $8,800. From 1965 to 1989, International Telecommunications Satellite Organization (INTELSAT) charges per voice channel declined by a factor of 132 to 1; those charges have dropped by a factor of 8 to 1 since 1980 alone.

The average price per international telephone call declined more than 55 percent between 1975 and 1988 -- from $21 to $9. U.S. industry international service revenues alone rose from $40 million in 1970, to more than $8 billion last year. The volume of international phone messages originating or terminating in the United States also grew nearly twenty-fold between 1975 and 1988, not counting service to and from Canada and Mexico.

Growing Disparities and Imbalances

Overshadowing this outstanding industry performance, however, has been the growing problem of America's net settlements deficit, addressed today in our companion decisions.

In general, customer prices for international calling are appreciably higher overseas than in the United States. That dampens calling demand abroad, and helps produce marked traffic imbalances between U.S. and foreign carriers.

Today, the United States generates far more international calls than it receives. Many foreign communications administrations also charge far more than their costs for terminating international calls, especially calls from the United States. Both because we make more calls and pay high, non-cost-based charges, the

United States currently pays out more than it receives. The U.S. net settlements deficit, moreover, has been rapidly growing -- from about $40 million in 1980, to more than $2 billion in 1989, an increase of some 5,000 percent.

Unfortunately, our international settlements deficit is more than keeping pace with growth in the market, and increasing by 20 percent a year. Compounded annually, that deficit doubles every 3.6 years. If current growth and foreign settlements practices are maintained, moreover, the deficit would reach more than $7 billion over the next seven years.

Significantly, there is also growing indication of discrimination. Many foreign telecommunications administrations apparently charge U.S.-based international carriers substantially higher accounting rates than charged other carriers in their geographic region. For example, as documented in our Report & Order, the telecommunications administrations of certain members of the Commission of the European Communities (EC) today charge U.S. carriers accounting rates which are more than twice those charged fellow EC-based carriers. A pattern of apparent discrimination can be discerned in other geographic regions.

Need for Action

Last year, this Commission commenced an inquiry into the way international payments are currently established. We suggested that rate negotiations among U.S. and foreign communications companies might well be undertaken with a view toward ameliorating this growing international settlements problem.

Changes have occurred. Canada, Britain, France, Hong Kong, the Netherlands, Singapore, and Sweden have recently instituted accounting rate reductions. In Japan, international calling prices -- collection rates -- have been reduced. German authorities have indicated that both accounting and collection rate reductions will be forthcoming. General public as well as business community pressures for price reductions, however, have been growing, both in the United States and abroad.

Hundreds of thousands of American and other Allied nations' military personnel, and their families, experienced first-hand the arcane -- and expensive-

- workings of the international accounting and settlements regime in conjunction with the Gulf War. For instance, many American servicemen and service women had families living in Britain, Germany, and the United States. Many British military had their families living in both the United Kingdom and Germany; and French soldiers had families in France and Germany. All of the Allied military stationed in the Gulf paid dearly to call home, as telephone prices reflected high, non-cost-based charges assessed by the Saudi Arabian telecommunications and other administrations. This, in turn, engendered many complaints in the United States and other countries.

Close Following of Developments

The Report & Order which we are adopting today directs U.S. international carriers promptly to commence negotiations with their foreign correspondents with the goal of establishing by 1993 accounting rates that are: (a) consistent with relevant cost trends; and (b) eliminate any non-cost-based disparities between the accounting rates applied by foreign carriers within their geographic region and those applied to calls from the United States. We also clearly signal our support for parallel international initiatives aimed at resolving these serious problems.

Our fundamental goal should be to bring the prices charged the public and business community more in line with actual costs. International communications users deserve more fully to benefit from the substantial cost reductions which modern technology and increased traffic volumes should make possible.

Together with the Commission staff, I intend closely to monitor U.S. carrier actions and international developments. The Further Notice of Proposed Rulemaking is designed to gather information. If the facts warrant, I will not hesitate to recommend that the Commission consider further action.

International communications should be a means of strengthening mutual respect and understanding, and furthering important goals including expanded, liberalized world trade. It should not be a process through which American international callers are, in effect, involuntarily burdened with excessive costs.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policy Regarding Character Qualifications in Broadcast Licensing

Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1991; Released: May 24, 1991

By the Commission: Commissioner Duggan issuing a separate statement.

1. The Commission has before it two petitions for reconsideration of our *Policy Statement and Order* in this proceeding, 5 FCC Rcd 3252, 55 Fed. Reg. 23082 (1990) (hereinafter referred to as *1990 Character Policy Statement)*. The *1990 Character Policy Statement* generally broadened the previously enunciated range of licensee misconduct that would be considered relevant in judging the character qualifications of a broadcast applicant. We also required broadcast licensees to report adjudications of relevant misconduct to the Commission within thirty days of the final decisions in such cases. *See* 47 C.F.R. § 1.65(c).

2. The petition filed jointly by Media Access Project and Telecommunications Research and Action Center (hereinafter referred to as MAP) requests that we further expand the range of relevant misconduct and the scope of matters that must be reported to the Commission. The petition filed jointly by Chronicle Broadcasting Co., Post-Newsweek Stations, Inc., The Providence Journal Company, Shenandoah Valley Educational Television Corporation, and the Spartan Radiocasting Company (Joint Petitioners) requests that we ease the reporting burden imposed on licensees and clarify the reporting requirement.[1]

A. The Range of Relevant Non-FCC Misconduct

3. MAP suggests that the Commission's inquiry into an applicant's character should include consideration of all civil judgments that involve misrepresentation, whether or not the misrepresentation is made to a governmental unit. It also contends that the Commission should consider convictions for non-serious as well as serious misdemeanors. Specifically, MAP argues that civil violations of law involving misrepresentation raise substantial and material questions as to an applicant's propensity to violate FCC requirements such as sponsorship identification and lowest unit charge. It also argues that the Commission should not limit the relevance of misdemeanors based on whether the crime is "serious" or not because "the very same acts will be a felony in one state, a 'serious' misdemeanor in a second, and a 'non-serious' misdemeanor in a third." Rather, MAP believes the Commission should focus on the nature of the underlying misconduct, and it argues that convictions for "non-serious" misdemeanors like consumer fraud, election law violations, payment of gratuities to public employees, failure to file disclosure reports, and recordkeeping violations reflect adversely on an applicant's propensity to fulfill the obligations of a licensee.

4. MAP also urges us to consider unadjudicated allegations of misconduct in cases where the facts are undisputed. It states that plea bargains, consent decrees, and settlements often involve stipulations of fact that may be sufficient to raise substantial and material questions concerning an applicant's character, and such admissions should be considered by the Commission. Further, because the standard of proof that applies in criminal proceedings is higher than in Commission proceedings, MAP contends that criminal indictments raise substantial and material questions as to a licensee's character even where the defendant is acquitted. The commenters addressing MAP's suggestions oppose any expansion of the range of relevant misconduct.

5. *Discussion.* Our 1986 and 1990 policy statements identified the categories of non-FCC misconduct that are most clearly relevant to an applicant's qualifications. We continue to believe the public interest would not be served by expenditure of Commission and applicant resources on routine consideration of other, less relevant categories of misdeeds.

6. Specifically, as to civil matters, we continue to believe that judgments relating to fraudulent representations to a governmental unit or mass media related violations of antitrust or anticompetitive laws bear most directly on an applicant's qualification to be a broadcast licensee. We recognize that some civil misrepresentations not involving governmental units may be relevant to a broadcaster's character qualifications. Nevertheless, based on our experience, we believe that the category of civil misrepresentation is too broad to be presumptively relevant to a broadcaster's qualifications. We may, however, consider such matters on a case-by-case basis. Similarly, we do not believe that, as a general matter, misdemeanor convictions presumptively have relevance. In certain circumstances, misdemeanor convictions are more serious and may be relevant. Nevertheless, broadening the category of misdemeanors as suggested by MAP would effectively require that we routinely evaluate the relevance of virtually all misdemeanor convictions, and, in the vast majority of cases, would most probably lead to prolonged litigation without countervailing public interest benefits. We also continue to believe that allegations of relevant non-FCC related misconduct should generally be resolved by the forum in which the litigation is pending.[2] Where that litigation has ended in a settlement agreement, consent decree, or acquittal and there is no admission or finding of unlawful misconduct, we believe it is generally inappropriate for us to reach legal conclusions on the basis of any stipulated facts.[3] The Commission generally does not have the expertise or resources to resolve questions of

state or federal law outside its principal area of jurisdiction, and it is generally more efficient to allow other forums to resolve such matters and for us to focus on adjudicated misconduct. As we indicated in the *1990 Character Policy Statement*, however, although we intend to be guided by these policies, we remain "free to exercise . . . discretion in situations that arise." 5 FCC Rcd at 3252, citing *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Co.*, 589 F2d 658, 666 (D.C. Cir. 1978).

B. Scope of Reportable Misconduct

7. Consistent with its suggestion that we broaden the range of relevant misconduct, MAP urges us to require applicants and licensees to report all civil and criminal violations of law involving misrepresentation, all misdemeanors, consent decrees, and indictments. In contrast, the Joint Petitioners and Cox, noting that we may consider "serious misdemeanor convictions in appropriate or compelling cases," seek clarification as to which misdemeanors are "serious" and therefore presumably reportable. The Joint Petitioners, as well as NAB and Cox, also suggest that we require reporting of adjudicated non-FCC misconduct only where a licensee principal (i.e., a person with an attributable interest in the licensee) is a named defendant in the adjudication.

8. *Discussion*. Although we may consider serious misdemeanor convictions in appropriate or compelling cases, consistent with our view that misdemeanors in the vast majority of cases are not relevant to our character concerns, we did not require that misdemeanor convictions be reported to us. We see no reason to change this decision. We will determine which misdemeanors are serious and the effect of any such convictions on a case-by-case basis as such matters are brought to our attention by concerned parties. Similarly, in light of our determination that civil misrepresentation not involving governmental units is not generally relevant, *see* paragraph 6, *supra*, we will not require reporting of such adjudications. In this regard, we note that applicants must report indictments, as well as other pending cases involving relevant misconduct, and, in appropriate cases, information on pending cases of relevant misconduct may form the basis of a condition on the grant of the application. *1990 Character Policy Statement*, 5 FCC Rcd at 5253. In the case of licensees for which no applications are pending, however, there is no grant upon which to place such a condition. Thus, we reject MAP's proposal, and we will continue to require licensees to report only adjudicated relevant misconduct under the new section 1.65(c).

9. We also reject Joint Petitioners' request that principals of a licensee be required to report adjudicated non-FCC misconduct only if they are a named defendant. We see no rational basis for such a limitation. In our attribution rules, we generally determined that officers, directors and persons holding a five percent or greater voting interest may exercise influence or control over a licensee. *See* 47 C.F.R. § 73.3555 Note 2; *see also Attribution of Ownership*, 97 FCC 2d 997 (1984).[4] In light of this conclusion, it logically follows that such persons may also affect management of a non-licensee company. There is no reason to assume, for example, that a director of a non-licensee company convicted of misconduct was not in a position to influence that company's behavior unless he or she was a named defendant. Accordingly, as is our practice with the reporting of non-FCC misconduct in the context of applications, licensees will be required to report non-FCC misconduct involving any persons holding cognizable interests (as defined in section 73.3555 Note 2) in both the licensee and the non-licensee found to have committed the misconduct.[5] Whether such reported misconduct will affect the licensee's character qualifications will continue to be determined on a case-by-case basis,[6] taking into account, *inter alia*, the involvement, if any, in the misconduct of the licensee principal involved.

C. Timing of the Reports Required by Section 1.65 (c)

10. The Joint Petitioners contend that reporting adverse adjudications of relevant misconduct within 30 days of the adjudication imposes a substantial burden.[7] They argue that licensees need more time to monitor and report on their own litigation activities and those of any person or entity holding an attributable interest in the licensee. For corporate licensees with outside directors and/or other business interests and for non-commercial licensees with large governing boards, they claim that considerable effort will have to be expended to monitor litigation involving a large number of diverse and often far-flung persons and enterprises. To ease the burden of continually monitoring such litigation, the Joint Petitioners suggest that the Commission require only annual litigation reports, filed at the same time as the annual ownership report. In reply, MAP concedes that less timely reports may be appropriate for certain types of misconduct, but it argues that felony convictions are so significant that they should be reported within the 30 day time frame.

11. *Discussion*. Section 1.65(c) requires permittees and licensees to report final adverse adjudications of misconduct that would be reportable on an application for renewal.[8] Under the *1990 Character Policy Statement*, renewal applicants will be required to report adverse final action taken by any court or administrative body with respect to the applicant or parties to the application relating to any felony, mass media related antitrust or unfair competition, criminal fraud, fraud before another governmental unit, or discrimination. We recognize that in a relatively small number of cases, the reports required by section 1.65(c) may require the repeated monitoring of a large number of persons and the business entities with which they are associated, including firms that are otherwise unrelated to the licensee. We are also not unmindful of the commenters' concern that the failure to make timely reports of relevant adverse adjudications may constitute a violation at least as serious as the adjudicated wrongdoing.

12. In these circumstances, we believe that the Commission's regulatory goals would not be adversely affected by requiring the reports to be filed within 90 days of the time a permittee or licensee becomes knowledgable of the adjudicated misconduct. In this regard, permittees and licensees have an obligation to make reasonable, good faith efforts to become informed of reportable adjudications of relevant misconduct. The additional time will give permittees and licensees the opportunity to focus on the filing of complete and accurate reports, without unduly impeding the commencement of whatever action the Commission deems appropriate in a particular case. Moreover, if the Commission should learn of a relevant adverse adjudication through other means, *e.g.*, by complaint or press reports, we would not necessarily await the filing of the report before taking appropriate action, in-

cluding requesting details of the adjudication from the permittee or licensee. Section 1.65(c) is being amended accordingly.

D. Other Matters

13. *Comparative Consideration of Character.* MAP suggests that we consider non-disqualifying misconduct in comparative proceedings. It argues that our present policy not to do so is irrational, because "an incumbent licensee convicted of a non-disqualifying 'non serious' or drug misdemeanor [will] always receive a renewal expectancy as against a never-convicted challenger," and "[i]t is similarly illogical never to consider such misconduct, even convictions on multiple counts, in deciding which of two otherwise identical applicants for a new station is best qualified to serve the public."

14. We continue to believe that character is essentially a matter of an applicant's basic qualifications. Our experience has been that there is little to be gained from comparative consideration of non-FCC related misconduct that is insufficient to warrant disqualification. Such matters tend to delay and complicate comparative hearings more than to help select the comparatively superior applicant. Thus, as we determined in the *1986 Policy Statement*, the public interest is better served by eliminating such considerations from comparative proceedings. *See Alden Communications Corp.*, 3 FCC Rcd 5047 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 6601, 6602 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 5413 (1989), *aff'd.*, D.C. Cir. 89-1488 (Oct. 30, 1990)(mem.). FCC-related misconduct will, however, continue to be relevant to a renewal applicant's ability to obtain a renewal expectancy. *See 1986 Policy Statement*, 102 FCC 2d at 1232 n. 125.

15. *Conditions on Grants.* MAP notes that although the Commission has the discretion to condition grant of an application on the outcome of pending proceedings in other forums, it has rarely exercised this power. To remedy this, MAP suggests that the Commission announce a new policy of deferring action on applications where appropriate and specifically conditioning all grants on the review of any subsequent adjudication of potentially disqualifying conduct, including misconduct by station assignors or transferors.

16. The *1990 Character Policy Statement* indicated that, in appropriate cases, we would condition grants on the outcome of pending proceedings in other forums. We do not believe it would be appropriate to adopt a policy of blanket conditions in all cases or to adopt a general deferral policy. Rather, our policy is to review all such cases on their merits in determining whether a condition is appropriate and the parameters of any such conditions. We believe that this approach best balances the Commission's concern with character qualifications with the need to process applications expeditiously and to ensure prompt service to the public.

17. *Section 312 (a).* Cox argues that midterm reports of adverse adjudications are unnecessary as the Communications Act does not empower the Commission to revoke a license on the basis of such adjudications. Section 312(a)(2) provides that the Commission may revoke a station license "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." 47 U.S.C. § 312(a)(2). Cox contends that the terms of this provision are limited to situations in which the relevant "conditions" were in existence prior to a grant but were unknown to the Commission.

18. We believe the provision is substantially broader in scope, permitting the revocation of a license for "conditions" occurring during the license term. *See Radio Para La Raza*, 27 RR 2d 836, 840 (1973) (section 312(a)(2) permits the Commission to look at events following the grant of an application); *cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, n.3 (1969) (a requirement of operation in the public interest is implicit in section 312(a)(2) revocation authority). Section 312(a)(2) is thus broad enough to support a revocation of license where misconduct adjudicated during the license term would have been sufficient to support the denial of an initial license or renewal if that adjudication had been concluded prior to the grant of the initial license or renewal.

E. Conclusion

19. Accordingly, IT IS ORDERED that the Petition for reconsideration filed jointly by the Media Access Project and the Telecommunications Research and Action Center IS DENIED.

20. IT IS FURTHER ORDERED that the Petition for Reconsideration filed jointly by Chronicle Broadcasting Co., Post-Newsweek Stations, Inc., The Providence Journal Company, Shenandoah Valley Educational Television Corporation, and the Spartan Radiocasting Company IS GRANTED to the extent indicated above, and IS DENIED in all other respects.

21. IT IS FURTHER ORDERED that section 1.65(c) of the Commission's rules IS AMENDED as set forth in the Appendix hereto, EFFECTIVE 30 days after publication in the Federal Register.[9]

22. The action herein is taken pursuant to section 4(i), 303(r), 308(b), 312, 319(a) and 403 of the Communications Act of 1934, as amended.

For further information regarding this proceeding, contact Martin Blumenthal, Office of General Counsel, (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 1 of Title 47 of the C.F.R. is amended as follows:

1. The authority citation for Part 1 continues to read: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 154, 303; Implement, 5 U.S.C. § 552, unless otherwise noted.

2. Section 1.65 is amended by revising paragraph (c) to read as follows:

§ 165 Substantial and significant changes in information furnished by applicants to the Commission.

* * * * *

(c) All broadcast permittees and licensees must report to the Commission any adverse finding or adverse final action taken by any court or administrative body that involves conduct bearing on the permittee's or licensee's character qualifications and that would be reportable in connection with an application for renewal as reflected in the renewal form. The report required by this subsection must be filed within 90 days of the date that the permittee or licensee becomes knowledgable of any such reportable adverse findings or adverse final actions not previously reported to the Commission. Permittees and licensees bear the obligation to make reasonable, good faith efforts to become knowledgable of any such reportable adjudicated misconduct.

FOOTNOTES

[1] Comments were filed by the National Association of Broadcasters (NAB); the National Broadcasting Company, Inc. (NBC); EZ Communications, Inc. (with Great American Television and Radio Company, Inc., McGraw-Hill Broadcasting Company, Inc., and Renaissance Communications Corporation); and Cox Enterprises, Inc. (with HSN Communications, Inc.). LIN Broadcasting Corporation and Vermont ETV, Inc. filed statements in support of the Joint Petition. MAP filed reply comments.

[2] We retain the discretion to condition grants on the outcome of pending litigation involving relevant non-FCC related misconduct. *See* 1990 *Character Policy Statement*, 5 FCC Rcd at 3253.

[3] A plea bargain generally involves a plea of guilty to one or more criminal charges. As a result of that plea, the defendant is convicted of the crime. Such a conviction is an adjudication for purposes of applying our character policy.

[4] Note 2 provides for exceptions to this general rule for: minority interests in corporations if there is a single holder of more than 50% of the voting stock; certain investment companies, insurance companies and bank trust departments; insulated limited partnership interests; and certain officers and directors of diversified corporations or parent corporations.

[5] With respect to Cox's suggestion that an exemption be created for licensee shareholders who hold their shares "for investment purposes only" and are "not materially involved in the day-to-day operations of the station," such an exemption would be inconsistent with our attribution rules, which incorporate a presumption that owners of a five percent or greater voting interest are generally in a position to influence a licensee.

[6] *See 1990 Character Policy Statement*, 5 FCC Rcd at 3252 & n. 4; *1986 Character Policy Statement*, 102 FCC 2d at 1227-29.

[7] We note that the Joint Petitioners also asked the Office of Management and Budget (OMB) to deny approval of the reporting requirement under the Paperwork Reduction Act. OMB approved the reporting requirement on August 2, 1990. (OMB Control No. 3060-0449).

[8] Applicants are required to update their applications by reporting the initiation or adjudication of relevant actions within 30 days of their occurrence pursuant to section 1.65(b). That requirement remains unchanged by this Memorandum Opinion and Order.

[9] Licensees are currently required to file section 1.65(c) reports within 30 days of the relevant adjudication. In light of our decision to increase the time interval for such reports, we will not enforce the existing rule prior to the effective date of the revised rule. The amendment of the rule is not a "substantive or material modification" that would require further approval from OMB under the Paperwork Reduction Act. *See* 5 C.F.R. § 1320.11(h).

Separate Statement of Commissioner Ervin S. Duggan

In re: Policy Regarding Character Qualifications in Broadcast Licensing

Although I join my colleagues in adopting this item to modify our character policy for broadcast licensees, I am troubled by one aspect of our Order. Specifically, I am concerned by our decision to exclude consideration of civil consent decrees, even when misconduct related to mass media issues is clearly involved. Two recent consent agreements entered between the Federal Trade Commission and two telemarketers providing 900 lines aimed at children, for example, involve conduct that I would find relevant to an applicant's character to become an FCC licensee. Such consent decrees are often entered for reasons of administrative convenience even when there is no doubt that actual misconduct occurred. Should we be officially blind to such occasions?

I take some comfort in the fact that we remain "free to exercise ... discretion in situations that arise." But since certain types of civil consent decrees are not covered by our Character Policy reporting requirements, we must rely upon outside parties to report such incidents to the FCC. Wouldn't the public interest be better served by requiring reporting of such matters? The alternative is to risk the danger that we may grant a license without ever knowing of misconduct that might well sway us if we but knew.

FOOTNOTES TO STATEMENT

[1] *See, e.g., Communications Daily*, "FTC Obtains 2 Consent Agreements with Providers of 900 Ads for Kids, "May 9, 1991 at 1.

[2] *1990 Character Policy Statement*, 5 FCC Rcd 3252, 3252 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-323

In re Applications of

HS COMMUNICATIONS, INC.	File No. BPH-880505MZ
CHESAPEAKE BAY FM BROADCASTERS LIMITED PARTNERSHIP	File No. BPH-880505NH
STACY C. BRODY	File No. BPH-880505NO
PAMELA R. JONES	File No. BPH-880505NR
VPC, LTD.	File No. BPH-880505NS
CHESAPEAKE MEDIA COMMUNICATIONS CORP.	File No. BPH-880505NZ
CRAIG L. SIEBERT	File No. BPH-880505PM
INTRACOASTAL AIRWAVES LIMITED PARTNERSHIP	File No. BPH-880505PN

For Construction Permit for
New FM Station, Channel 271A,
Virginia Beach, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1991; Released: June 11, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. By *Memorandum Opinion and Order*, FCC 91M-1437, released April 24, 1991, Administrative Law Judge Edward J. Kuhlmann (ALJ) dismissed (with prejudice) the application of Chesapeake Bay FM Broadcasters Limited Partnership (Bay).[1] On May 1, 1991, Bay appealed its dismissal to the Board, and on May 9 and May 13, 1991, respectively, Pamela R. Jones (Jones) and HS Communications, Inc. (HS), opposed Bay's appeal. For the reasons set forth herein, the Board will deny Bay's appeal.

2. *Background*: When Bay initially filed its application over three years ago (on May 5, 1988), it specified a transmitter/antenna site, utilizing a tower with a height of 246 feet within three miles of "a major Navy air facility" (Oceana Naval Air Station). *See Memorandum Opinion and Order*, FCC 91M-865, released March 7, 1991 at para. 4. The engineering and technical portion of Bay's application had been prepared by Bay's engineering consultant, Richard L. Vega. Vega apparently also prepared and filed on behalf of Bay a "Notice of Proposed |Tower| Construction" with the Federal Aviation Administration (FAA); however, and perhaps not unexpectedly, the FAA determined that Bay's proposal would present a hazard to air navigation, and notified Bay of its negative determination (sent to Vega) on March 30, 1989. In this communication, the FAA also provided Bay with a 30-day period in which to request a "further study" by that agency. However, Bay did not respond.

3. On March 20, 1990, and after not receiving any communication from Bay during the intervening year, the FAA notified Bay that its consideration of Bay's proposal was terminated. However, with this notification, the FAA declared that if Bay reduced its proposed tower height to 160 feet above ground level (AGL), Bay's tower construction could be approved. The FAA additionally furnished Bay with an appropriate form with which to reactivate its application. Again, however, Bay filed no response with the FAA.

4. Subsequently, on July 5, 1990, the Commission released its *Hearing Designation Order*, 5 FCC Rcd 3949 (1990) (HDO), in this proceeding specifying, *inter alia*, an "air hazard" issue against Bay. The HDO specifically noted that the FAA had directly notified the Commission that the tower proposed by Bay "would constitute a hazard to air navigation." *Id.*, at 3951. On January 29, 1991, nearly two full years after the FAA determined that Bay's proposed site would be a hazard to air navigation, and approximately seven months after issuance of the HDO, Bay attempted to amend its application before the ALJ to demonstrate a suitable transmitter site/antenna height.

5. Upon consideration of the matter, the ALJ rejected Bay's engineering amendment, declaring:

> Bay offers no acceptable reason for waiting 2 1/2 years to correct a defect in its engineering. On a number of occasions during that time Bay was specifically given an opportunity to address the engineering problem. The FAA told Bay a year ago exactly how to design its antenna to meet FAA regulations. While Bay argues that it was ignorant of the Commission's rules regarding amendments, it was warned on July [11], 1990 that knowledge of the procedural rules was necessary to effectively prosecute its application. *Order*, FCC 90-2000, released July 11, 1990 (per Chief ALJ Stirmer). Bay concedes in its reply that it knew the Commission had designated an issue about its antenna site. Even if Bay could have waited until the hearing to cure its engineering problem, Chief Judge Stirmer scheduled the hearing for October 10, 1990 and Bay apparently did nothing until November to even find out about the issue. Bay then waited three more months to submit a proposed change to its antenna. There is no evidence that Bay acted diligently given the numerous opportunities it had. As the Commission pointed out in *Warren Price Communications, Inc.*, 5 FCC Rcd 2906, 2911, n. 10 (1990), adherence to procedures is essential in large multiparty proceedings if the case is to be effectively managed and concluded in a reasonable amount of time. The hearing phase of this case began last July and Bay did nothing until January 29, 199[1], seven months later, to act on its air hazard problem. Bay's excuse

that it was unaware of the need to act diligently is even less acceptable in Bay's case because of the failure to report issue that was designated against Bay in the HDO. The reporting issue directs Bay's attention to the very rule that requires that applications be kept current and that matters bearing on the decision be brought to the Commission's attention within thirty days. 47 C.F.R. §1.65. No matter how much time Bay believed it had to respond to the orders in the HDO, everywhere it could have turned in the HDO there was notice about what was expected. Bay did nothing. Not only did Bay fail to act diligently in resolving its air hazard problem but it failed to inform the Commission about that problem. Even its amendment is a carefully crafted recitation which withholds the necessary facts to fully understand what Bay knew and did. The amendment raises an issue about what facts Bay withheld from the Commission and how that came to pass.

* * * *

One other matter requires comment about Bay's behavior in this proceeding. Bay claimed in its petition for leave to amend that it did not have counsel until November 1990 and, therefore, it was handicapped in understanding the Commission's requirements. While there is no merit to that claim, if it were true, the Commission has routinely held that an applicant's decision to proceeding without counsel is a matter within the applicant's control and, therefore, it will not excuse a failure to comply with the rules and orders of the Commission. In any event Bay did have the assistance of an engineer and the issue about its antenna proposal was a technical one not a legal issue. Moreover, Bay's dereliction resulted from a lack of concern or diligence and the apparent unwillingness of Bay's general partner to seek legal counsel, to familiarize himself with simple filing rules and to tend to the applicant's affairs.

Memorandum Opinion and Order, FCC 91M-865, *supra*, at paras. 8, 17. Following the release of that *Order*, Jones, a competing applicant here, filed a motion seeking, *inter alia*, dismissal of Bay's application. In response, the ALJ granted Jones' motion in the *Order* under appeal (FCC 91M-1437), terminating Bay's further participation in the hearing.

6. In its appeal, Bay seeks reversal of its dismissal based upon a pyramid of claims of ignorance, nonfeasance, and naivete. Specifically, Bay argues (1) that its principal, William A. Tinsley, is "inexperienced" as to broadcast application proceedings before the Commission; (2) that it was not represented by counsel until at least November 1990;[2] (3) that because of a "change of address" of its engineering consultant, Richard L. Vega, neither Bay (nor Vega) ever received the multiple adverse FAA notifications;[3] (4) that even though Tinsley received and reviewed a copy of the HDO released July 5, 1990, expressly indicating that the FAA had determined that Bay's proposed tower would be a hazard to air navigation, he did not contact Vega (or the FAA) to adduce any facts concerning this potentially fatal defect, and that it was not until November 1990 that Bay's "newly-retained" counsel raised any questions concerning the "air hazard" issue;[4] (5) that once Bay learned of the "air hazard" problem, it "proceeded with due diligence" to lower its proposed tower height (at the original site) to conform with the FAA's March 1990 notice; (6) that it did demonstrate "good cause" for the acceptance of its January 29, 1991 amendment;[5] and (7) that equity demands that the Board find "good cause" and reinstate Bay's application.

7. *Discussion*: Even if the Board accepted at face value Bay's tale of studied ignorance and unexplained indifference as to the status of its long-pending notice of proposed construction (filed with the FAA in early 1988),[6] we would find that Bay has failed to meet the strict "good cause" test for engineering amendments set forth in 47 CFR §73.3522(b)(1). That provision of the Commission's Rules provides that late-filed amendments will be considered only upon a showing of "good cause," *see Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970),[7] *and* a demonstration that "the amendment is necessitated by events which the applicant could not reasonably have foreseen." Here, Bay proposed to erect a tower within three miles of a major Navy air station. Yet, neither Bay (nor its engineering consultant Vega) ever made further inquiry to the FAA as to the status of Bay's pending notice of proposed construction. Further, even when Tinsley read the HDO released July 5, 1990, he still did nothing, even though it was clear from the HDO that Bay's proposed tower had been determined by the FAA to be a hazard to air navigation. This is clearly not "due diligence." *See Royce International Broadcasting v. FCC*, 820 F.2d 1332, 1336-1337 (D.C. Cir. 1987) (due diligence runs from the time an applicant was, or should have been, aware of issue requiring amendment). Bay's claim of lack of legal counsel (even if true) is similarly unavailing. Tinsley himself read the HDO as released July 5, 1990, and his affidavit reveals he knew then that Bay had an "air hazard" defect. *See* note 4, *supra*. As the court observed in *Royce*, "the HDO contained no obscurities requiring the interpretive skills of a lawyer," *id.*, at 1336, and there, as here, the language of the HDO was similarly unambiguous. Thus, in the conspicuous absence of FAA approval of Bay's proposed tower construction for a period of time encompassing nearly two-and-a-half years, it can hardly be claimed that Bay's amendment was "unforseeable." *See* 47 CFR §73.3522(b)(1); *Cuban-American Limited*, 5 FCC Rcd 3781, 3782 (1990)).

8. In fact, in a virtually identical situation in *Big Bay Broadcasting*, 4 FCC Rcd 4676 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 1294 (1990), the Board denied the application of a party who (1) originally specified a 343-foot tower within three miles of an airport; (2) claimed it was not aware that its consulting engineer had received an adverse determination from the FAA and the subsequent termination of the FAA's aeronautical study because of no response from the applicant; and, (3) did nothing for seven months following release of the HDO specifying an "air hazard" issue. The ALJ there also determined that the applicant's proposed site amendment should be rejected because it had failed to demonstrate "due diligence" for more than two years prior to designation for hearing, or even for the seven months subsequent to designation. The Board agreed with the ALJ's resolution of the matter, and we similarly hold here that Bay has not demonstrated "due diligence", nor has it demonstrated "good cause" for the acceptance of its engineering amendment and subsequent reinstatement of its application. As in *Big Bay*, we reject Bay's identical claim of misreliance

upon its engineering consultant; for, as the Board has declared, an applicant "is not relieved of its duty to update its application and keep the Commission informed merely because of its misplaced reliance upon its engineer." *Texas Communications Limited Partnership*, 5 FCC Rcd 5876, 5877 (Rev. Bd. 1990). *See also Natick Broadcast Associates, Inc.*, 6 FCC 2d 607, 611 (1967). An applicant may not proceed for a plainly undue period of time without FAA tower approval, make no inquiries whatever as to status, and then claim "due diligence." To accept such a claim would relieve all applicants of the burden of care and attention to the rudiments of a pending application. Nor shall we reward convenient claims of utter ignorance of basic FCC licensing requirements, lack of legal representation, or nonfeasance of engineering consultant. *See Royce International, supra*, at 1337 (lack of legal representation or engineering expertise inadequate excuse; even applicants who proceed *pro se* are not exempt from compliance with FCC rules and orders).

9. ACCORDINGLY, IT IS ORDERED, That the "Appeal from Dismissal" filed by Chesapeake Bay FM Broadcasters Limited Partnership on May 1, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] By *Memorandum Opinion and Order*, FCC 91M-1697, released May 23, 1991, the ALJ also dismissed the application of Chesapeake Media Communications Corp.

[2] At note 1 of his *Order*, the ALJ commented upon Bay's assertion of "lack of counsel" (emphasis added):

> This particular claim raises one more possibility. Like a badge of mercy Bay pleads that it did not have counsel until November 1990. The truth appears otherwise. Bay appeared to be represented by counsel at the prehearing conference but now that same counsel states, without explanation, that he had "potential conflicts of interest," at the time and that, while he appeared at the prehearing, he was not actually representing Bay. Although that may be the case, that is not what counsel Lawrence Movshin told the Commission on September 10, 1990. At transcript 2-5, Mr. Movshin represented that he had been retained the Friday before the conference by Bay and he said a notice of appearance would be filed that day. If counsel gave no legal advice about the proceeding before November then what was he doing at the prehearing? And if he had conflicts when he told the Commission that he was representing Bay on September 10, the issue is more troublesome, because that statement appears to present an inconsistent representation to the Commission by a lawyer about his role in a Commission proceeding. It may represent unethical conduct. This is not a matter to be resolved in this proceeding, however. The general counsel has directed that all questions of ethical conduct by lawyers be referred to his office, unless the conduct relates to hearing issues. Whether Bay had a lawyer, as already explained, does not change the consequences of Bay's actions. *The question raised about the counsel for Bay will be referred to the general counsel.*

[3] Richard L. Vega executed an affidavit on February 19, 1991, which was submitted with Bay's reply to oppositions to its petition for leave to amend. There, Vega claims:

> 2. In 1988, during the period the subject application was prepared, I maintained offices in Orlando, Florida as well as in Longwood, Florida. The engineer who worked on the Bay application was located in the Orlando, Florida office. Early in 1989, approximately January or February of that year, I closed the Orlando office.
>
> 3. Although my firm had given the United States Postal Service information concerning the forwarding of mail, to the best of my information and belief, my office in Longwood, Florida did not receive a March 30, 1989 FAA notice that was apparently mailed to the Orlando office.
>
> 4. An FAA notice dated March 20, 1990 was also sent to my former Orlando office address. Although it finally was received at my office in Longwood, Florida, it was not brought to my attention, nor was a copy sent to Mr. William A. Tinsley, the General Partner of Bay.
>
> 5. I had no communication with Mr. Tinsley, the General Partner of Bay, after Bay's application was filed at the FCC until late November of 1990, when I received a call from Mr. Tinsley, inquiring whether there was a need to make a change to Bay's transmitter site. Mr. Tinsley stated that counsel had advised him to speak with me concerning this question. I concluded that there had been a logistical problem both in the forwarding of FAA correspondence to my attention, and in forwarding this information to Bay's General Partner. As soon as Mr. Tinsley requested that I resolve the problem identified by the FAA, I took action to review the problem and revise Bay's engineering.

[4] This claim (Appeal at para. 5), is undercut by an earlier-filed affidavit (dated February 18, 1991) of Bay's principal, William A. Tinsley. In support of a reply to oppositions to Bay's petition for leave to amend, Tinsley swore:

> 8. I received and reviewed a copy of the Hearing Designation ("HDO") that was issued on July 5, 1990 in this proceeding. As part of my review, I read paragraph 13 of the Hearing Designation Order, which stated under the caption "Other Matters":
>
> > Determinations have been received from the Federal Aviation Administration that the antennas proposed by Bay, Limited and Jones would constitute a hazard to air navigation. Further, attempts to obtain FAA clearance for Song, Century and Media's proposals through the Communication's Antenna Survey Branch and the applicants have been unsuccessful. Finally, we have not received a copy of Intercoastal's final FAA Advisory Board's proposal to use the same site listed in Jones' application. Therefore, an issue with respect thereto will be included and the FAA made a party to the proceeding.
>
> When I read this, I understood this to mean that an issue concerning Bay's antenna would be addressed at the hearing. I did not realize that Bay must do something to modify or change its transmitter site within a specified

period of time after the release of the Hearing Designation Order. Therefore, I did not believe that it was necessary to discuss this matter with our engineering firm at that time.

9. In November of 1990, Bay retained the firm of Thelen, Marrin, Johnson & Bridges to assist with Bay's presentation at the hearing in this proceeding. Lawrence J. Movshin and Karlyn D. Stanley entered their appearances in this matter on behalf of Bay on November 7, 1990.

10. Less than a month after Thelen, Marrin, Johnson & Bridges was retained by Bay, counsel brought to my attention a question concerning the height of Bay's transmitter. I stated at that time, in response to counsel's questions, that I had not received any notification from the Federal Aviation Administration ("FAA") concerning the antenna or Bay's transmitter site. A short time after that conversation, counsel reported to me that a letter from the FAA had been received by Bay's engineering consultant, Richard L. Vega, but that apparently the FAA letter had not been forwarded to me. Counsel recommended that I speak with our engineering consultant as swiftly as possible, which I did.

[5] In its amendment petition, Bay's *sole* "good cause" argument is as follows: Issue number 13 of the HDO was specified to determine whether there is a reasonable possibility that the tower heights and locations proposed by Bay and other applicants would constitute a hazard to air navigation. By letter, the FAA's Eastern Regional office notified the office of Bay's engineering consultant that its proposed tower construction would constitute a hazard to air navigation. A copy of that letter, which was only recently forwarded to Bay's general partner and Bay's counsel, is attached hereto . . . Bay proposes to simultaneously reduce the tower and corresponding antenna height at the original site and increase the effective radiated power . . . . This change will comply with the FAA requirements as stated in the FAA letter, but the increase in effective radiated power does not increase the originally proposed service area because of the lower antenna height. Bay will not gain a comparative advantage by the changes proposed in this amendment.

[6] Although we accept, *arguendo* for purposes of the instant appeal, Bay's factual claims that its engineering consultant, Richard L. Vega, did not receive the subject FAA notices and that counsel did not, until November 1990, advise Tinsley of the import of the HDO, we agree with the ALJ (*see supra*, para. 5) that Bay's cumulative claims of ignorance and nonfeasance ought not necessarily be taken at face value. Thus, we would need to explore Vega's explanations as to his alleged failure to come into possession of the FAA notice(s) and of the failure, since May 1988, to inquire into the status of Bay's FAA Notice of Proposed Construction (specifying Vega's address). We would also need to explore Bay's claim of lack of legal representation until November 1990, in the face of counsel's September 1990 appearance on behalf of Bay. Or, framed another way, prior to any acceptance of a site amendment by Bay, there would need to be resolved the "truthfulness" issue specified in the ALJ's *Memorandum Opinion and Order*, FCC 91M-865, released March 7, 1991; and the need to try and resolve that issue, in and of itself, would mitigate strongly against the acceptance of Bay's late-filed amendment. *See* 47 CFR §73.3522(e)(ii) (no enlargement of issues required for amendment acceptance).

[7] The six-element test for demonstrating good cause, as set forth in *O'Conner*, is: due diligence; amendment not required by voluntary act of applicant; no modification or addition of issues or parties; no disruption of orderly conduct of hearing; other parties not unfairly prejudiced; and, no comparative advantage to applicant.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-546

In re Applications of

Andrew J. Guest d/b/a ALTAMAHA BROADCASTING	File No. BPH-871223MO
FRED GLADSTONE	File No. BPH-871224MD
STEWART BROADCASTING, INC.	File No. BPH-871224MG

For Construction Permit for
New FM Station, Channel 299C2,
Darien, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 1991; Released: June 12, 1991

By the Review Board: BLUMENTHAL and ESBENSEN. Chairman MARINO absent.

1. In his *Initial Decision*, FCC 91D-18, released April 18, 1991, Administrative Law Judge John M. Frysiak determined, on a comparative basis, that Stewart Broadcasting, Inc. (Stewart) was the superior applicant and granted its application for construction permit for a new Class C2 FM station to serve Darien, Georgia. The remaining two applicants, Fred Gladstone (Gladstone) and Altamaha Broadcasting (Altamaha), were found to be basically qualified to be Commission licensees.

2. However, rather than pursue this matter further, the parties have jointly agreed to settle this proceeding. Thus, now before the Board is a Joint Request for Approval of Settlement Agreements and Dismissal of Applications as filed by the captioned parties on May 15, 1991, as well as comments in support thereof filed by the Commission's Mass Media Bureau on May 30, 1991.

3. By the terms of the settlement agreements, which are included as exhibits to the Joint Request, the applications of Gladstone and Altamaha would be dismissed with prejudice, the application of Stewart would be granted, and Stewart would pay Gladstone and Altamaha $20,000.00 each subsequent to the time that the subject grants and dismissals become final and unappealable.

4. The Joint Request fully complies with the provisions of 47 U.S.C. § 311(c) and 47 CFR § 73.3525(a) that govern settlement agreements. Attached to the Joint Request are copies of the agreements between the parties which contain declarations from the principals of the applicants setting forth the reasons why the agreements are in the public interest, and stating that their applications were not filed for the purpose of carrying out a settlement agreement. This resolution of the proceeding will serve the public interest by expediting the institution of a new FM service in Darien, Georgia.

5. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreements and Dismissal of Applications filed May 15, 1991 by Andrew J. Guest d/b/a Altamaha Broadcasting, Fred Gladstone, and Stewart Broadcasting, Inc., IS GRANTED; that the attached settlement agreements ARE APPROVED; that the applications of Andrew J. Guest d/b/a Altamaha Broadcasting (File No. BPH-871223MO), and Fred Gladstone (File No. BPH-871224MD) ARE DISMISSED WITH PREJUDICE; and that the application of Stewart Broadcasting, Inc. (File No. BPH-871224MG) IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-499

In the Matter of

Amendment of Part 74 to Permit the Use of F3Y Emission for Encrypting Communications of Remote Pickup Broadcast Stations

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 22, 1991; Released: June 11, 1991

By the Commission:

INTRODUCTION

1. The Commission has under consideration a *Notice of Proposed Rule Making* [1] ("*Notice*") and a comment filed by Capital Cities/ABC, Inc. ("ABC") in response thereto. The *Notice* proposed to amend Subpart D of Part 74 of the Rules to permit use of digital voice ("F3Y") [2] emission for encrypting aural communications of remote pickup broadcast stations. This would enable licensees to prevent unauthorized interception and use by third parties of intra-station communications related to news-gathering and program production. We will adopt the proposed rules with a minor modification suggested in the comment.

BACKGROUND

2. The *Notice* was prompted by the staff's receipt of several applications for authorization to use F3Y emission in the Remote Pickup Broadcast Service. [3] Basically, the applicants desired to keep communications relating to news reporting confidential until the stories could be "aired." The broadcasters maintained that although third party reception and use of such radio signals is prohibited,[4] the aggressive competition among news crews to be first with an exclusive news story sometimes makes the extra level of protection afforded by digital encryption technology necessary. [5]

DISCUSSION

3. In its comments, ABC supports our proposals and suggests a minor adjustment to the proposed station identification requirements. Specifically, ABC requests that stations using F3Y emission be required to transmit unscrambled analog or international Morse Code station identification at intervals not exceeding 15 minutes during operation, preferably using the broadcast station's Part 73 call sign. [6] This procedure would enable any party receiving interference from such operation to more rapidly identify the source and would minimally inconvenience the user of the F3Y emission. Moreover, the Part 73 call sign can be traced easily through commercial sources without recourse to FCC files. We agree with ABC's suggestion and therefore conclude that this suggestion has merit and have amended the final rules appropriately.

4. In conclusion, we note that the proposed (and herein adopted) emission limits applicable to the F3Y emission permit only 20 kHz nominal occupied bandwidth operation. Thus, the bandwidth required for F3Y emission precludes its use at facilities in the 450.01 to 455.99 MHz band, which are authorized the use of 10 kHz bandwidth channels. Moreover, even though F3Y emission could be used on a normally wide bandwidth channel (e.g., a 100 kHz bandwidth channel in the 450.925 and 455.925 MHz band), only F3Y emissions authorized a 20 kHz bandwidth may be used in the Remote Pickup Service. This is necessary because the F3Y emission limitations are based on the use of a digitizing method which uses the minimum signal sampling rate necessary for satisfactory voice intelligibility. The resultant emissions are compatible with voice-modulated narrowband FM emissions traditionally used in the land mobile services and on most remote pickup channels. These "narrowband" emission limitations, which envision operation on 25 kHz or 30 kHz bandwidth channels, do not permit use of the wider emitted bandwidths that would be required for digitizing systems using the higher signal sampling rates necessary for quality reproduction of music or other high fidelity programming. Therefore, we will not authorize wider bandwidth (i.e., greater than 20 kHz) F3Y emissions for use in scrambling high fidelity programming.

---

[1] *See, Notice of Proposed Rule Making* in MM Docket No. 90-499, FCC 90-348, 5 FCC Rcd 6682 (1990).

[2] The F3Y emission designator has been replaced by the more recently developed ITU designators F1E and G1E, representing, respectively, frequency modulated and phase modulated single-channel digital telephony. However, because certain broadcast auxiliary application processing programs have not yet been modified to use the new ITU emission designators, F3Y will be used in this proceeding to refer to the F1E and G1E emissions.

[3] On July 13, 199 , the staff granted waivers to permit the use of F3Y emission by Jefferson Pilot Communications Company, licensee of station WBTV, Charlotte, North Carolina and by WSOC Television Inc., licensee of station WSOC, Charlotte, North Carolina.

[4] *See* Section 605 of the Communications Act of 1934, as amended.

[5] The broadcasters stated that after a news story has been broadcast over the air, prior permission of the originating station is required to rebroadcast the program material, *see* Section 325(a) of the Communications Act, and appropriate credit must be given to the source. Even if coverage is not exclusive, the station that "breaks the story" still, according to the broadcasters, retains the prestige of "being first." Pending formal release of a news story, however, broadcasters stated that the originating station may want to prevent the "competition" from intercepting information related to the event.

[6] Currently Section 74.482 requires that an auxiliary broadcast station be identified at the beginning and end of "each period of operation" or not less than once every hour. Optionally, the call sign of the "associated broadcast station" (i.e., the Part 73 call sign) may be used in lieu of the less familiar Part 74 authorized call sign.

5. **Final Regulatory Flexibility Act Analysis**

I. *Need and Purpose of The Action*

The action taken herein is necessary in order to permit Part 74 licensees to utilize the digitized voice (F3Y) emission.

II. *Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis*

No comments were submitted relating to the Initial Regulatory Flexibility Act Analysis. This action will allow licensees in the Broadcast Remote Pickup Service more flexibility and choice in how they transmit confidential information and other material that they do not wish disseminated without their control and/or approval.

III. *Significant Alternatives Considered and Rejected*

No commenters submitted alternatives to the proposal made in the *Notice*, other than a supplemental suggestion submitted by ABC which is being incorporated into the adopted rule amendments.

ADMINISTRATIVE MATTERS

6. Authority for these rule changes is contained in Sections 4(i), 302 and 303 of the Communications Act of 1934, as amended.

7. The rule changes contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and have been found to contain no new or modified record keeping requirements.

8. Accordingly, IT IS ORDERED THAT effective **July 25, 1991**, 47 CFR Part 74 of the Commission's Rules IS AMENDED as set forth in the attached Appendix. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 CFR Part 74 is amended as follows:

1. The authority citation for Part 74 will continue to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 74.462 is amended by revising the table in paragraph (b), by redesignating notes 1, 2, 3 and 4 as 2, 3, 4 and 5 respectively, by adding a new note 1,by revising redesignated note 4, and by adding new paragraphs (f) and (g) to read as follows:

74.462 Authorized bandwidth and emissions

*****

(b) ***

Frequencies (megahertz)	Authorized bandwidth[1] (kilohertz)	Maximum frequency deviation[2] (kilohertz)	Type of emission[3,4]
25.87 to 26.03	40	10	A3, F3, F3Y, F9
26.07 to 26.47	20	5	A3, F3, F3Y, F9
152.87 to 153.35[5]	30/60	5/10	A3, F3, F3Y, F9
160.89 to 161.37	60	10	A1, A2, A3, F1, F2, F3, F3Y, F9
161.64 to 161.76	30	5	A1, A2, A3, F1, F2, F3, F3Y, F9
166.25 to 170.15	25	5	A1, A2, A3, F1, F2, F3, F39 F9
450.01 to 455.99 (10 kHz channels)	10	1.5	A1, A2, A3, F1, F3, F3Y, F9
450.0875 to 455.6125 (25 kHz channels)	25	5	A1, A2, A3, F1, F2, F3, F3Y, F9
450.05 to 455.80 (50 kHz channels)	50	10	A1, A2, A3, F1, F2, F3, F3Y, F9
450.925 and 455.925 (100 kHz channels)	100	35	A1, A2, A3, F1, F2, F3, F3Y, F9

[1] Notwithstanding the authorized bandwidths shown in the table, not more than 20 kHz bandwidth will be authorized in the case of F3Y emission.

[4] The emission designators shown in the table no longer conform to those contained in Subpart C of Part 2 of the Commission's Rules and Regulations. They will be so-conformed after necessary modifications to broadcast auxiliary application processing programs are completed. For transmitting equipment which is type accepted, emission designators will appear in the Commission's Radio Equipment List. Equipment approved for emissions contained in Subpart C of Part 2 may be used by Part 74 stations if their emissions are equivalent to the previous emission designators shown in the table.

* * * * *

(f) For those transmitters using the F3Y emission and operating in the frequency range between 25.87 MHz and 170.15 MHz, the power of any emission shall be attenuated below the unmodulated carrier power (P) in accordance with the following schedule:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (F_d in kHz) of more than 5 kHz, up to and including 10 kHz: At least 83 Log_{10} (F_d/5) decibels;

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (F_d in kHz) of more than 10 kHz, up to and including 250 percent of the authorized bandwidth: At least 29 Log_{10} ((F_d) exp2/11) decibels or 50 decibels, whichever is the lesser attenuation.

(3) On any frequency removed from the center of the authorized bandwidth by more than 250 percent of the authorized bandwidth: At least 43 plus 10 Log_{10} (output power in watts) decibels or 80 decibels, whichever is the lesser attenuation.

(g) For those transmitters using the F3Y emission and operating in the frequency range between 450.01 MHz and 455.925 MHz, the power of any emission shall be attenuated below the unmodulated carrier power (P) in accordance with the following schedule:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (F_d in kHz) of more than 5 kHz, up to and including 10 kHz: At least 83 Log_{10} (F_d/5) decibels;

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (F_d in kHz) of more than 10 kHz, up to and including 250 percent of the authorized bandwidth: At least 116 Log_{10} (F_d/6.1) decibels or 70 decibels, whichever is the lesser attenuation.

(3) On any frequency removed from the center of the authorized bandwidth by more than 250 percent of the authorized bandwidth: At least 43 + 10 Log_{10} (output power in watts) decibels or 80 decibels, whichever is the lesser attenuation. Note: The measurements of emission power can be expressed in peak or mean values provided they are expressed in the same parameters as the unmodulated transmitter carrier power.

3. Section 74.482 is amended by adding a new paragraph (e) to read as follows:

74.482 Station identification

* * * * *

(e) For stations using the F3Y emission, identification shall be transmitted in the unscrambled analog (F3) mode or in International Morse Code pursuant to the provisions of paragraph (d) of this section at intervals not to exceed 15 minutes. For purposes of rule enforcement, all licensees using F3Y emissions shall provide, upon request by the Commission, a full and complete description of the encoding methodology they currently use.

Note: Stations are encouraged to identify using their associated Part 73 station call sign.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-515

In re Applications of

RADIO ASSOCIATES, INC.	File No. BPH-880720MQ
DOXA, INC.	File No. BPED-880722MB
ANTHONY J. BOVE, JR.	File No. BPH-880722MJ
HELEN SPARKS QUINN	File No. BPH-880722MP
THE MOODY BIBLE INSTITUTE OF CHICAGO	File No. BPED-880725MB
BULLDOG BROADCASTING, INC.	File No. BPH-880725MD

For Construction Permit for new
FM Station, Channel 270A,
Brownsburg, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1991; Released: June 12, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Board has before it the Appeal of Radio Associates, Inc. (Associates), filed May 20, 1991,[1] from the *Memorandum Opinion and Order*, FCC 91M-1549, released May 6, 1991, by Administrative Law Judge Richard L. Sippel (ALJ), dismissing Associates' application for failure to timely comply with the ALJ's prior order to show "good cause" for the acceptance of its financial amendment or face dismissal.[2] It also has before it the opposition pleadings of the other parties.

BACKGROUND

2. In brief, and pursuant to the Board's ruling in *Radio Associates, Inc.*, FCC 91R-34, released April 18, 1991, the ALJ ordered Associates to file its "good cause" showing for application amendment by April 30. However, on that appointed day, Associates did not file its "good cause" showing; instead it filed a "captive" request for an extension of time and, through (former) counsel, represented to the ALJ that:

> Associates has several principals, who have met at length since then [the unspecified date of receipt of the Order] to prepare a correct statement of Associates' efforts. Further checking of records and consultation with counsel are necessary to draft an accurate and thorough statement.

FCC 91M-1549 at para. 4. But observing (1) that Associates' application has been on file since July 20, 1988, and (2) that "Associates was relying on self-financing since at least January 10, 1991," *id.*, at para. 7, the ALJ found no basis for the grant of an extension of time, citing *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 172 n.34 (1991) and *Texas Communications Ltd. Partnership*, FCC 90I-021, March 28, 1991.

3. However, in some apparent conflict with Associates' April 30th representation to the ALJ that more time was necessary to prepare Associates' showing, Associates, through (new) counsel, now represents to the Board (1) that the principals of Associates had *already* provided (former) counsel with a full statement on its financing efforts and had directed its (former) counsel to timely file that statement with the ALJ, but that (2) former counsel "failed to follow that directive."[3] In light thereof, Associates holds itself blameless for its failure to timely comply with the ALJ's order of April 18, and it's appeal seeks reinstatement.

APPEAL

4. Conspicuously not included with Associates' appeal to this Board was the substantive "statement" allegedly supplied by Associates to its (former) counsel in timely fashion, which "statement" would have formed the essence of Associates' "good cause" amendment showing. Thus, although Associates' original appeal appended five (5) discrete attachments (A-E) in an effort to fix blame solely upon (former) counsel, it quite purposely avoided supplying the Board with the critical document(s) it claims were, in fact, timely in the hands of (former) counsel. But without scrutinizing that alleged "statement," the Board had no persuasive basis upon which to accept Associates' unsupported claim that (former) counsel timely possessed Associates' "good cause" showing, especially in light of (former) counsel's rather conflicting claim to the ALJ that "[f]urther checking of records" was required to draft an accurate "statement." Accordingly, the Board requested that Associates supply the so-called "statement" for the record, in order to determine the validity of both its past and present claims.

5. By transmittal letter of May 22, 1991, Associates supplied two sets of documents: (1) the April 29, 1991 affidavit of Associates' president, Odes E. Robinson, Jr., which in pertinent part states:

> The checking of the box marked "Not Qualified" under Section III Financial Qualifications of Form FCC 301 (October 1986) was done without knowledge as to the technicialities of filing of FCC applications and inadvertently misstated the true financial condition of Radio Associates, Inc. and its shareholders.

> Notwithstanding the foregoing, adequate financial information to fully prove to the Commission the full and complete ability of the Corporation and its shareholders to perform, was delivered to counsel for Radio Associates, Inc. within sufficient time to amend the Application shortly after its filing.

And, (2), copies of the January 1989 "agreements" as amongst the eight (voting and non-voting) principals of Associates, each respectively pledging to loan the corporation a *pro rata* share of the funds necessary to construct and operate the proposed station. But no showing is here made as to the 1989 (or current) abilities of the various shareholders to meet their respective financial commitments.

DISCUSSION

6. As we have had too frequently an occassion to note as of late:

> Under the particular regulatory regime prevailing at the time the instant applications were filed, an applicant was required to merely "certify" (under pain of perjury) that it possessed "committed sources of funds to construct and operate for three months without revenue." *Northampton Media Associates*, 4 FCC Rcd 5117, 5118-10 (1989). Because many broadcast applicants were found to have falsely certified to their basic financial qualifications, *see Public Notice* 62 RR 2d 638, 639 (1987), the Commission has recently abandoned its failed "certification" policy in favor of a return to the fully documented financial showing requirement that existed prior to 1981. *Revision of Form 301*, 4 FCC Rcd 3853, 3858-60 (1989).

Edwin A. Bernstein, FCC 91R-40, released May 23, 1991 at n.1.

7. In the case before us, and as detailed more fully in our ruling referenced in para. 2, *supra*, when Associates filed its application on July 20, 1988, Odes E. Robinson personally certified *in the negative* as to the sufficiency of Associates' financial resources. Because its negative financial showing had never thereafter been revised, the December 1990 *Hearing Designation Order* governing this case specified an issue "[t]o determine with respect to Associates whether the applicant is financially qualified."[4] However, and without repeating the facts detailed in the several prior rulings of the ALJ and the Board pertaining to Associates' finances, at *no* time in its succession of prior pleadings did Associates claim -- as it now does here for the first time -- that its negative financial certification was in error from the outset and that it was always fully qualified based solely upon the aforementioned "loan agreements" of its constituent shareholders. Indeed, every action and representation of Associates, to this late moment, has suggested the opposite, a perfect example of which was its most recent representation to the ALJ that, in seeking an extension, more time was necessary to "prepare a correct statement of Associates efforts" to *become* financially qualified subsequent to its 1988 application filing. Nowhere in its instant appeal does Associates even attempt to explain the obvious contradictions.

8. Although Associates' inexplicable conduct has seriously delayed this proceeding, and we are generally reluctant to accept the excuse of malfeasence of (prior) counsel for an applicant's serious prosecution failures, *see, e.g., Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, 420 n.6 (1986), the alleged facts before us are unlike those in our prior cases, to wit, Associates' instant claim that the representations made by its (former) counsel were not only erroneous but *directly contrary* to Associates' knowledge, desire, and its express directives to (former) counsel.

9. Associates' immediate appeal pleadings, however, answer no pertinent questions. Rather, the instant claims raise substantial and material questions of fact as to (1) whether Associates was, in fact, financially qualified when it originally filed; (2) if it was, why it certified its application in the negative notwithstanding, and made no prior effort to correct its alleged miscertification; (3) the validity of its current claim that it has been mistaken all along as to its financial ability to fund the station; and (4) whether its prior representations to the ALJ were either flatly untrue, or merely unauthorized by the applicant. We will therefore remand this case to the ALJ not only on the financial issue already specified in the *Hearing Designation Order*, but on an issue to determine whether Associates has misrepresented facts to the Commission or lacked candor in its present or past responses concerning this particular matter. The hearing we order shall be a *full* evidentiary hearing on both issues; and, in view of the peculiar allegations which necessitate this very action, the issues shall not be decided by motion or summary decision. At that hearing, Associates and *each* of its principals shall have the burden of proving their individual and collective financial resources, *see Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 (1989),[5] both at the time of the 1988 application filing and currently. We expect no further delays from Associates in the trial of these issues, and the ALJ should continue to apply the Commission's procedural rules firmly during the course of this hearing.

10. ACCORDINGLY, IT IS ORDERED, That the Appeal filed May 20, 1991 by Radio Associates, Inc. IS DISMISSED, and that the issues herein ARE ENLARGED as follows:

> To determine whether Radio Associates, Inc. has misrepresented facts or lacked candor in its past or present statements to the Commission regarding its financial qualifications.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Under Section 1.301(c)(2) of the rules, Associates' appeal of its dismissal was due on May 13, 1991. However, pleading retention of new counsel, Associates sought and received a five (5) day extension of time to file this appeal. *See* Letter of May 13, 1991 from Allan Sacks to Aaron P. Shainis.

[2] *See Order*, FCC 91M-1400, released April 22, 1991.

[3] Appeal at 3.

[4] *See* 5 FCC Rcd at 7400.

[5] Because, as its principal claim, Associates has both discussed its instructions to (former) counsel, blamed its failure on (former) counsel, and now contradicts the representations of (former) counsel as to its finances, it has waived any claim of attorney-client privilege as to these matters. *See Welch Communications, Inc.*, 4 FCC Rcd 3979 (Rev. Bd. 1989). The testimony of (former) counsel is now imperative to assess Associates' claims, as well as its past and present representations.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-551

In the Matter of

Amendment of Section 73.202(b), RM-7385
Table of Allotments,
FM Broadcast Stations.
(South Bend, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 28, 1991; Released: June 11, 1991

By the Chief, Allocations Branch:

1. At the request of Blue Denim Music, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6956 (1990), issued in response to a petition for rule making proposing the allotment of Channel 289C3 to South Bend, Washington, as the community's first local FM transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 289C3 to South Bend, Washington, since it would provide the community with its first local FM transmission service. Channel 289C3 can be allotted to South Bend in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [1] Concurrence of the Canadian government has been obtained, since South Bend is located within 320 kilometers (200 miles) of the U. S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 25, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
South Bend, Washington	289C3

4. The window period for filing applications will open on **July 26, 1991**, and close on **August 25, 1991**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 289C3 at South Bend are North Latitude 46-39-48 and West Longitude 123-48-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-612

In the Matter of

Amendment of Section 73.202(b),	RM-7550
Table of Allotments,	RM-7685
FM Broadcast Stations.	
(Fox Farm, Wyoming and	
Gering, Nebraska) [1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 28, 1991; Released: June 11, 1991

By the Chief, Allocations Branch:

1. At the request of Farm Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7495 (1990), proposing the allotment of Channel 280C1 to Fox Farm, Wyoming, as the community's first local FM broadcast service. Petitioner and Radio Property Ventures-Cheyenne, Inc., filed comments in support of the proposal stating their intention to apply for the channel, if allotted. Gering Community Broadcasters ("GCB") filed a counterproposal proposing the allotment of Channel 280C at Gering, Nebraska, as the community's first local FM transmission service, and reply comments reaffirming its intention to apply for the channel, if allotted. [2]

2. An engineering study reveals that there is no alternate Class C1 channel available for Fox Farm or alternate Class C channel available for Gering, Nebraska. Therefore, after reviewing the proposals, we believe that both communities are deserving of a first local FM transmission service. However, we are unable to grant both requests. Consequently, our decision will be based on the allotment priorities set forth in *Revision of FM Assignment Policy and Procedures*, 90 FCC 2d 88, 92 (1982), which are:

(1) First fulltime aural service;

(2) Second fulltime aural service;

(3) First local service;

(4) Other public interest matters.

[Co-equal weight given on priorities (2) and (3)]

3. In examining the mutually exclusive proposals, we find that the Gering allotment is preferable under priority (3). The allotment of Channel 280C to Gering would provide the community (population 7,760) [3] with its first local transmission service. The allotment of Channel 280C1 to Fox Farm would provide a first local FM transmission service to a community of 2,850 persons. [4]

4. In view of the above information, we believe the public interest would be better served by granting the proposal for the allotment of Channel 280C at Gering, Nebraska, since this would provide the community with its first local FM transmission service. The proposal for the allotment of Channel 280C1 at Fox Farm is denied. The allotment for Channel 280C at Gering can be made in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [5]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 25, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Gering, Nebraska	280C

6. The window period for filing applications will open on **July 26, 1991**, and close on **August 25, 1991**.

7. IT IS FURTHER ORDERED, That the proposal filed by Fox Farm Broadcasting to allot Channel 280C1 to Fox Farm, Wyoming (RM-7550), IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of Gering has been added to the caption.
[2] Public Notice of GCB's counterproposal was given on March 27, 1991, Report No. 1842. In its reply comments, GCB's erroneously refers to the proposed allotment at Gering as Channel 280C1 in lieu of Channel 280C.
[3] Population figures are from the 1980 U. S. Census.
[4] We note that there is a construction permit for Station WSHY-AM in Fox Farm.
[5] The coordinates for Channel 280C at Gering are North Latitude 41-49-42 and West Longitude 103-39-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

MM Docket No. 91-5

In the Matter of

Amendment of Section 73.202(b), RM-7587
Table of Allotments,
FM Broadcast Stations.
(Richwood, Louisiana)

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 28, 1991; Released: June 11, 1991

By the Chief, Allocations Branch:

1. At the request of Robco Communications ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 583 (1991), proposing the allotment of Channel 265A to Richwood, Louisiana, as the community's first local FM service. Petitioner filed supporting comments and reply comments reaffirming its intention to apply for Channel 265A, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 265A to Richwood, Louisiana, because it could provide the community with its first local FM transmission service. Channel 265A can be allotted to Richwood in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. [1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Richwood, Louisiana	265A

4. The window period for filing applications will open on **July 26, 1991,** and close on **August 25, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

[1] The coordinates for Channel 265A at Richwood are North Latitude 32-26-24 and West Longitude 92-04-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-6

In the Matter of

Amendment of Section 73.202(b),	RM-7590
Table of Allotments,	
FM Broadcast Stations.	
(Oxford, Mississippi)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 28, 1991; Released: June 11, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 585 (1991), issued in response to a petition filed by Oxford Radio, Inc. ("petitioner"), proposing the substitution of Channel 229A for Channel 296A at Oxford, Mississippi. Petitioner also requested modification of its license for Station WKLJ-FM, Channel 296A, to specify operation on Channel 229A. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. Comments were also filed by Champion Radio Group. [1] Petitioner filed reply comments.

2. We believe the public interest would be served by the substitution of Channel 229A for Channel 296A at Oxford, Mississippi, since it would allow Station WKLJ-FM to increase its operation to six kilowatts, thereby expanding its coverage area. As indicated in the *Notice*, petitioner states that operation on Channel 229A at six kilowatts will result in a 36.3% increase in its existing service area so than an additional 12,062 persons will receive WKLJ-FM's increased coverage. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site. [2] In addition, we are modifying petitioner's license for Station WKLJ-FM, Oxford, Mississippi, to specify operation on Channel 229A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Oxford, Mississippi	229A, 238A, 248C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WKLJ-FM, Oxford, Mississippi, IS MODIFIED to specify operation on Channel 229A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in WKLJ-FM's license, BLH-850226KT, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-850226KT, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATION COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Champion Radio Group withdrew its comments on April 8, 1991. In accordance with Section 1.420(j) of the Commission's Rules, Champion Radio Group provided a copy of the agreement between petitioner and itself stating it will be reimbursed for expenses incurred in connection with this matter.

[2] The coordinates for Channel 229A are 34-21-32 and 89-38-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 31, 1991

AT&T COMMUNICATIONS FILES SUPPLEMENTAL INFORMATION IN CONNECTION WITH AT&T TRANSMITTAL 2902

Comment Cycle Established

On February 15, 1991, AT&T Communications (AT&T) filed Transmittal 2902 to establish a 15 percent discount on its basic long distance service (LDMTS) for customers using an AT&T Card Issuer Identifier (CIID) to make LDMTS calls worth $30 or more in a three-month period. The credit would be paid to customers annually in the form of a gift certificate that can be used for AT&T's telecommunications services, or for goods and services from participating vendors.

On May 29, 1991, AT&T filed supplemental information in connection with Transmittal 2902. The supplemental information includes details of the costs associated with calls charged to an AT&T CIID/891 card, compared to costs for calls charged to a commercial credit card or to a local exchange carrier line-based card. In addition, AT&T provides cost information which seeks to justify the volume discount within the AT&T CIID/891 calling card category.

Copies of AT&T's May 29, 1991 supplemental information for Transmittal 2902, along with other related documents, may be obtained from the Downtown Copy Center (DCC). The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, DC.

Parties wishing to comment on AT&T's May 29, 1991 filing may do so no later than June 11, 1991. An original and four copies of all comments must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each comment must be filed with DCC.

For further information, contact Jane Gross, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Contel Telephone Companies Transmittal No. 80
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: May 31, 1991; Released: May 31, 1991

By the Chief, Common Carrier Bureau:

1. On February 22, 1991, the Contel Telephone Companies (Contel) filed Transmittal No. 80 to provide, on an individual case basis (ICB), 24 DS3 Special Access facilities in Putnam, Texas, to Communications Transmission, Inc. (CTI). Contel proposes to assess a nonrecurring charge for the service of $7,500 and monthly recurring charges of $11,110. The service would be provided for a ten-year period. The tariff is scheduled to take effect on June 1, 1991. For the reasons discussed below, we find that Contel Transmittal 80 is unlawful and therefore must be rejected.

2. In the *DS3 ICB Order* [1] the Commission stated that DS3 facilities should be offered by local exchange carriers (LECs) at generally available rates. The Commission also stated that "carriers that continue to file ICB rates for DS3 service must justify the use of such rates." *Id.* at 8642 (para. 68). The rationale was that, once a LEC gains sufficient experience with a service to develop averaged rates, it must do so.

3. This Contel transmittal would offer 24 DS3 facilities in Texas to a single customer, at ICB rates. [2] We believe that Contel's offering this number of facilities in one study area gives it more than enough experience to develop a general, averaged rate for DS3 service in Texas, which rate would be available to all potential DS3 customers in that state. Moreover, Contel has made no effort to justify its use of ICB pricing for CTI in Texas, as required by the *DS3 ICB Order*. The supporting materials filed with the transmittal contain no assertion that Contel lacks sufficient experience to develop a general rate. Therefore, we conclude that Contel's Transmittal 80 violates the standard adopted in the *DS3 ICB Order*. We therefore conclude that the transmittal is patently unlawful and must be rejected.

4. Therefore, IT IS ORDERED that Contel Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 80 IS REJECTED.

5. IT IS FURTHER ORDERED that Contel Telephone Companies SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on one day's notice.

6. IT IS FURTHER ORDERED that Special Permission No. 91-456 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. § § 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offering, CC Docket No. 88-136, GTE Telephone Operating Companies, CC Docket No. 89-305, 4 FCC Rcd 8634 (1989) *(DS3 ICB Order)*.

[2] Contel currently provides two DS3 facilities in Illinois for one customer, and one DS3 facility in California for one customer. Even though both Illinois DS3 facilities are provided to one customer, each facility has its own ICB rate in the Contel tariff.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 11, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. All responses to individuals are published in the FCC Record.

These decisions are available for public inspection. Each month, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exits.

The following Managing Director decisions are released for information:

American Paging, Inc. of Virginia- Request for reconsideration of the dismissal of application for a new control frequency on channel 18 in Washington, DC - **Dismissed as Moot** (May 6, 1991).

Central Wisconsin Broadcasting - Request for refund of filing fee for a licensee of Station WCCN-FM, Neillsville, Wisconsin - **Denied** (May 10, 1991).

Bell Communications Research (Bellcore) - Request for refund of an audit fee - **Denied** (May 10, 1991).

TNI Associates, A Limited Partnership - Request for reconsideration of the dismissal of an application for control station in Boston, Massachusetts - **Dismissed as Moot** (May 10, 1991).

HSN Broadcasting of New Jersey, Inc. - Request for refund of a hearing fee for renewal of the license of Station WHSE(TV) Channel 68, Newark, New Jersey - **Granted** - A total of $6,760.00 will be refunded (May 31, 1991).

Waite Park Broadcasting Co. - Request for refund of a hearing fee for a new FM broadcast station at Le Sueur, Minnesota - **Granted** - A total of $6,760.00 will be refunded (May 31, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-100

In re Applications of

MADALINA BROADCASTING, INC. (hereafter "Madalina")	File No. BPH-890921MB
BONNIE P. FOX (hereafter "Fox")	File No. BPH-890921MC
SCOTTLITE, INC. (hereafter "Scottlite")	File No. BPH-890921ME
Q PRIME INC. (hereafter "Q Prime")	File No. BPH-890921MF
LIN-MAR BROADCASTING, INC. (hereafter "Lin-Mar")	File No. BPH-890921MG
MARY GAINES (hereafter "Gaines")	File No. BPH-890921MH
CYNTHIA DEVANEY (hereafter "Devaney")	File No. BPH-890921MI
FORT WORTH RADIO, INCORPORATED (hereafter "Fort Worth")	File No. BPH-890921MJ
TEXAS COMMUNICATIONS, INC. (hereafter "TCI")	File No. BPH-890921MK
PODER BROADCASTING, INC. (hereafter "Poder")	File No. BPH-890921ML
PRAIRIE BROADCASTING, INC. (hereafter "PBI")	File No. BPH-890921MN
HALTOM CITY RADIO PARTNERS (hereafter "HCRP")	File No. BPH-890921MO
THE RADIO VOICE OF HALTOM CITY, INC. (hereafter "Voice")	File No. BPH-890921MQ
JONATHAN AND MARY LYN WOLFERT, A GENERAL PARTNERSHIP (hereafter "Wolfert")	File No. BPH-890921MR
HISPANIC COALITION, INC. (hereafter "HCI")	File No. BPH-890921MS
MICHAEL C. NELMS (hereafter "Nelms")	File No. BPH-890921MT
THE ANCHOR NETWORK LIMITED PARTNERSHIP (hereafter "Anchor")	File No. BPH-890921MX
LENOX BROADCASTING CORPORATION (hereafter "Lenox")	File No. BPH-890921MY
O'DAY BROADCASTING, LTD. (hereafter "O'Day")	File No. BPH-890921MZ
R. W. Andrews, Urban J. Endres, Billy Wayne Hooten, Charles R. Bowers d/b/a HALTOM MEDIA SERVICES (hereafter "HMS")	File No. BPH-890912NB
JOHN W. BARGER (hereafter "Barger")	File No. BPH-890921NC
MELANIE BRUTON (hereafter "Bruton")	File No. BPH-890921NG
CHARLES B. JOHNSON (hereafter "Johnson")	File No. BPH-890921NH
METROPLEX SPANISH BROADCASTERS, INC. (hereafter "Metroplex")	File No. BPH-890921NI
TARRANT COUNTY EDUCATIONAL FOUNDATION (hereafter "Tarrant")	File No. BPED-890921MA [Dismissed herein]
AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter "American Indian")	File No. BPH-890921NA [Dismissed herein]

For Construction Permit for
a New FM Station on Channel 227C2
(93.3 MHz) in Haltom City, Texas

ERRATUM

Adopted: May 24, 1991; Released: June 11, 1991

By the Chief, Audio Services Division:

The *Hearing Designation Order* in MM Docket No. 91-100 (released March 28, 1991) specified the 30-day period for filing amendments, as a matter of right, as beginning on December 8, 1989 and ending on January 8, 1990. However, one of the applicants in this proceeding, American Indian Broadcast Group, Inc., was inadvertently left off of the December 8, 1989 Public Notice announcing the acceptance for tender of 25 of the 26 applications in this proceeding. American Indian's application was accepted for tender by the Public Notice of December 14, 1989. Therefore, pursuant to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), *recon. denied, Memorandum Opinion and Order*, 50 Fed. Reg. 43157 (1985), the December 14, 1989 Public Notice would trigger a 30-day amendment of right period for all applicants in this proceeding. Thus, the period for filing amendments, as a matter of right, in the instant proceeding ended on January 16, 1990. Accordingly, the following amendments are accepted for filing as a matter of right:

APPLICANT	DATE(S) FILED
Devaney [1]	January 16, 1990
HCRP	January 9, 1990
O'Day	January 10, 1990
Bruton	January 10, 1990

All reference to the above amendments in the original *Hearing Designation Order* is HEREBY DELETED.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

[1] Since no determination has been received from the FAA as to whether the parameters specified in Devaney's application, as amended, would constitute a hazard to air navigation, the present air hazard issue remains specified as to Devaney.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-264

In the Matter of

Proposals to Reform the
Commission's Comparative
Hearing Process to Expedite
the Resolution of Cases

ERRATUM

Released: June 6, 1991

On December 21, 1990, the Commission released a *Report and Order* (FCC 90-410) in the above-entitled matter. The *Report and Order* was published in the Federal Register, 56 Fed. Reg. 787 (January 9, 1991). This erratum corrects errors that appeared in the Appendix portion of the *Report and Order*.

In paragraph 18 of the Appendix the order mistakenly refers to Section 73.3572 being amended by adding new paragraphs (c)(1) and (c)(2) instead of (d)(1) and (d)(2).

In paragraph 19 of the Appendix the order mistakenly refers to Section 73.3573 being amended by adding new paragraphs (f)(2)(A) and (f)(2)(B) instead of (g)(2)(A) and (g)(2)(B).

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

ERRATUM

Released: June 4, 1991

1. On May 17, 1991, the Common Carrier Bureau released a Memorandum Opinion and Order in this docket, pertaining to service quality and infrastructure development monitoring for local exchange carriers (LECs) under price cap regulation. [1] That Order should be corrected in the manner described in the following paragraphs.

2. At Attachment B, pages 13 and 14, footnote 55 should be deleted in its entirety.

3. At Attachment B, page 25, the first paragraph should include the following sentence, which is inserted before the last sentence of that paragraph:

> Because the disaggregation of access lines into MSA and non-MSA classifications poses separate and more difficult problems, LECs will be allowed to postpone this reporting until the June 1992 Infrastructure Report.[112]

[112] LECs filing Infrastructure Reports in June 1991 may enter "0" in the MSA and non-MSA columns for this filing. All LECs may enter "0" in the MSA/non-MSA access lines columns of Tables II and V of the quarterly reports; the eight LECs that file Infrastructure Reports will enter data in these columns of the quarterly reports beginning June 30, 1992, when the data become available in their Infrastructure Reports. (Other LECs will continue to enter "0" in those columns.)

4. The first sentence of the definition of "Carrier Links," in the Row Instructions for Infrastructure Table II, should be changed to read:

> A Carrier Technology Segment (Carrier Link) is defined as a segment of the interoffice network disaggregated by technology *(i.e.,* analog, digital) and by medium *(i.e.,* copper, fiber, or radio).

This correction makes the definition of "Carrier Links" in the Row Instructions for Infrastructure Table II consistent with the definition in Attachment B, page 17, footnote 72.

5. The Infrastructure Table II, Column description of Call Set-Up Time should be changed to read:

> For the purposes of infrastructure reporting, call set-up time is defined as the time between dialing the last digit and the response or an acknowledgment "winkback," or the acknowledgment of signal receipt, from the interexchange carrier.

This definition is consistent with the discussion at paragraphs 21 and 22 of the Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, DA 91-619, released May 17, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-152

In the Matter of

Amendment of Section 73.202(b),	RM-7085
Table of Allotments,	RM-7092
FM Broadcast Stations.	RM-7225
(Pontotoc, Winona,	RM-7352
Coffeeville and Rienzi,	RM-7437
Mississippi, and Bolivar,	RM-7714
Middleton, Selmer and	
Ramer, Tennessee)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: May 30, 1991; Released: June 12, 1991

Comment Date: August 5, 1991
Reply Comment Date: August 20, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration are six separately filed conflicting petitions. The first petitioner, Tupelo Communications, Inc. ("Tupelo"), licensee of Station WSEL(FM), Pontotoc, Mississippi, requests the substitution of FM Channel 244C1 for Channel 244A and modification of its license to specify operation on the higher class channel (RM-7085). In order to accommodate this change, Tupelo requests the substitution of Channel 264A for 244A at Bolivar, Tennessee, licensed to Station WMOD, and substitution of Channel 236A for Channel 244A at Winona, Mississippi, licensed to Station WONA(FM). Tupelo indicates it will reimburse the licensees of WMOD and WONA(FM) for reasonable costs incurred in changing their channels of operation. The second petitioner, Middleton Broadcasters ("MB"), requests the allotment of Channel 264C3 to Middleton, Tennessee, as that community's first local broadcast service (RM-7225). The third petitioner, Slatton-Quick Company, Inc. ("Slatton-Quick"), licensee of Station WLAY, Muscle Shoals, Alabama, requests the substitution of Channel 264A for Channel 288A, Selmer, Tennessee, Station WXOQ (RM-7092). The substitution at Selmer will allow Station WLAY, Muscle Shoals, to increase its power to 6,000 watts. Slatton-Quick has agreed to reimburse Station WXOQ for its reasonable expenses for this shift. Smith Broadcasting, licensee of Station WXOQ, Selmer, has agreed to the substitution of channels. State Line Broadcasting ("State Line"), the fourth petitioner, proposes the allotment of Channel 264C3 to Ramer, Tennessee, as that community's first FM allotment (RM-7352). The fifth petitioner, Coffeeville Broadcasters, Ltd ("Coffeeville Broadcasters"), proposes the allotment of Channel 236A to Coffeeville, Mississippi, as that community's first local service (RM-7437). The sixth petitioner, Jack W. Ivy ("Ivy"), requests the allotment of FM Channel 267A to Rienzi, Mississippi, as that community's first local broadcast service.

2. An analysis of the above proposals reveals that they cannot all be accommodated since they are separated by less than the required distances specified in Section 73.207 of the Commission's Rules. [1] Channel 244C1 can be allotted to Pontotoc, Mississippi, in compliance with the spacing requirements at a site 17.7 kilometers (11 miles) northeast of the community. [2] Tupelo has proposed the site restriction to prevent a conflict with a rule making proceeding to upgrade Channel 243A to 243C3 at Clarksdale, Mississippi. *See* MM Docket 89-372, 4 FCC Rcd 6649 (1989). To accommodate the upgrade at Pontotoc, we shall propose the substitution of Channel 264A for Channel 244A at Bolivar, Tennessee [3] and Channel 236A for Channel 244A at Winona, Mississippi, and to modify the licenses for each station accordingly. [4] The substitutions at Bolivar and Winona can be made at the licensees' existing sites in compliance with the Commission's minimum distance separation requirements. Channel 264C3 can be allotted to Middleton, Tennessee, in compliance with the spacing requirements provided there is a site restriction 6.3 kilometers (3.9 miles) northeast of the community. [5] The site restriction will prevent a conflict with the construction permit for Channel 263C2, Station WBLE, Batesville, Mississippi. Channel 264A can be substituted for Channel 288A at Selmer, Tennessee, and the license for Station WXOQ modified accordingly, at the current site of Station WXOQ, in compliance with the minimum distance separation requirements of the Commission's rules. [6] Channel 264C3 can be allotted to Ramer, Tennessee, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 2.2 kilometers (1.4 miles) northwest of the community. [7] The site restriction will prevent a conflict with a construction permit for Station WVNA-FM, Channel 262C, Tuscumbia, Alabama. Channel 236A can be allotted to Coffeeville, Mississippi, in compliance with the Commission's spacing requirements without a site restriction. [8] Channel 267A can be

[1] The proposal for Pontotoc and Winona, Mississippi and Bolivar, Tennessee, will be governed by the old spacing requirements as it was filed prior to October 2, 1989, the effective date of the new rules. The proposals for Middleton, Ramer and Selmer, Tennessee, and Coffeeville and Rienzi, Mississippi, were filed after that date and will be processed under the new rules. *See* MM Docket 88-375, 4 FCC Rcd 6375 (1989).

[2] The coordinates for Channel 244C1 at Pontotoc, Mississippi, are 34-23-00 and 88-53-40.

[3] The coordinates for Channel 264A at Bolivar, Tennessee, are 35-15-00 and 88-53-28.

[4] The coordinates for Channel 236A at Winona, Mississippi, are 33-29-34 and 89-45-17.

[5] The coordinates for Channel 264C3 at Middleton, Tennessee, are 35-06-37 and 88-50-43.

[6] The coordinates for Channel 264A at Selmer, Tennesse, are 35-13-11 and 88-40-23.

[7] The coordinates for Channel 264C3 at Ramer, Tennessee, are 35-05-00 and 88-38-24.

[8] The coordinates for Channel 236A at Coffeeville, Mississippi, are 33-58-36 and 89-40-30.

allotted to Rienzi, Mississippi, in compliance with the Commission's spacing requirements without a site restriction. [9]

3. We believe the public interest would be served by seeking comments on the allotment of Channel 244C1 to Pontotoc, Mississippi, Channel 264A to Bolivar, Tennessee, and Channel 236A to Winona, Mississippi; or Channel 264C3 to Middleton, Tennessee; or Channel 264C3 to Ramer, Tennessee; or Channel 264A to Selmer, Tennessee; or Channel 236A to Coffeeville, Mississippi; or Channel 267A to Rienzi, Mississippi. We note that the Coffeeville proposal could be adopted in conjunction with any of the proosals except that of Tupelo for the substitutions at Pontotoc, Winona and Middleton. Adoption of these proposals could result in the provision of expanded service at Pontotoc, Mississippi, or first local service at Middleton or Ramer, Tennessee, or Coffeeville or Rienzi, Mississippi. The substitution of Channel 264A for Channel 288A at Selmer, Tennessee, would allow Station WLAY, Muscle Shoals, Alabama, Channel 288A, to increase its power from 3,000 watts to 6,000 watts. In this regard, we are providing the proponents with an opportunity to demonstrate why their respective proposals should be preferred. The parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). We note that a proposal for a first local service is generally preferred over proposals to enhance existing services.

4. As requested, we shall propose to modify the license of Station WSEL(FM) Pontotoc, Mississippi, to specify operation on Channel 244C1 in lieu of Channel 244A, in accordance with Section 1.420(g) of the Rules. We will issue *Oders to Show Cause* to the licensees of Station WMOD, Channel 244A, Bolivar, and Station WONA(FM), Channel 244A, Winona, to show why their licenses should not be modified as proposed herein. Because the license of Station WXOQ, Channel 288A, Selmer, has consented to the proposed substitution, we will not issue an *Order to Show Cause* to that licensee.

5. In view of the above, the Commission believes it is appropriate to solicit comments on the alternate proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

OPTION I

City	Channel No. Present	Proposed
Pontotoc, Mississippi	244A	244C1
Bolivar, Tennessee	234A, 244A	234A, 264A
Winona, Mississippi	244A	236A

OPTION II

Middleton, Tennessee	----	264C3
Coffeeville, Mississippi	----	236A

OPTION III

Selmer, Tennessee	230A, 288A	230A, 264A
Coffeeville, Mississippi	----	236A

OPTION IV

Ramer, Tennessee	----	264C3
Coffeeville, Mississippi	----	236A

OPTION V

Coffeeville, Mississippi	----	236A
Rienzi, Mississippi	----	267A

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, West Tennessee Radio Network, Inc., licensee of Station WMOD, Bolivar, Tennessee, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 264A in lieu of Channel 244A and Southern Electronics Co., Inc., licensee of Station WONA(FM), Winona, Mississippi, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 236A in lieu of Channel 244A.

7. Pursuant to Section 1.87 of the Commission's Rules, Southern Electronics Co., Inc., and West Tennessee Radio Network, Inc., may, not later than **August 5, 1991,** file a written statement showing with particularity why their respective authorizations should not be modified as proposed in the Order to Show Cause. The Commission may call on Southern Electronics Co., Inc., and/or West Tennessee Radio Network, Inc., to furnish additional information. If Southern Electronics Co., Inc. and/or West Tennessee Radio Network, Inc., raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Southern Electronics Co., Inc., and West Tennessee Radio Network, Inc., will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary Shall Send By Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the following:

[9] The coordinates for Channel 267A at Rienzi, Mississippi, are 34-46-00 and 88-31-42.

Southern Electronics Co., Inc.
Station WONA
Telephone Building
Winona, Mississippi 38967

West Tennessee Radio Network, Inc.
P. O. Box 438
Bolivar, Tennessee 38008

Steve Smith
WXOQ, Inc.
302 East Poplar Avenue
Selmer, Tennessee 38375

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **August 5, 1991,** and reply comments on or before **August 20, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Rod A. Callahan,
President, Tupelo Communications, Inc.
20 Emerson Street
Crafton
Pittsburgh,
Pennsylvania 15205

M. Scott Johnson
Catherine M. Grofer
Gardner, Carton & Douglas
1001 Pennsylvania Avenue, N.W.
Suite 750-N
Washington, D.C. 20004
(Counsel for Slatton-Quick Co. Inc.)

Billy J. Crabb
Middleton Broadcasters
27 Edgemont
Tupelo, Mississippi 38801

John A. Bosari
900 Seventeenth Street, N.W.
Suite 900
Washington, DC 20036
(Counsel for State Line Broadcasting)

Coffeeville Broadcasters, Ltd.
1210 South 12th Street
Gadsden, Alabama 35901

Jack W. Ivy
Rt. 1, Box 419
Belmont, Mississippi 38827

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-597

In the Matter of

Amendment of Section 73.202(b),	RM-7118
Table of Allotments,	RM-7321
FM Broadcast Stations.	
(Wiggins and D'Iberville,	
Mississippi)	

REQUEST FOR SUPPLEMENTAL INFORMATION

Adopted: May 30, 1991; Released: June 12, 1991

Comment Date: August 5, 1991

By the Chief, Allocations Branch:

1. The Commission adopted a *Notice of Proposed Rule Making*, 4 FCC Rcd 8791 (1989), in response to a petition filed by John F. White ("petitioner") requesting the substitution of Channel 250C2 for Channel 250A, Wiggins, Mississippi. Petitioner also requested modification of his construction permit for Station WOTC, Channel 250A, to specify operation on Channel 250C2 (BPH-860918OB). Petitioner filed a counterproposal requesting the change of community of license for Channel 250C2 from Wiggins to D'Iberville, Mississippi. [1] The Commission adopted a *First Report and Order* simultaneously with this *Request* granting petitioner's request for the substitution of Channel 250C2 for Channel 250A, Wiggins, and modification of the construction permit to specify the higher class channel.

2. Petitioner counterproposed the change of community of license for Channel 250C2 from Wiggins to D'Iberville, Mississippi, in accordance with Section 1.420(i) of the Commission's Rules. Petitioner stated that the change of community of license would provide D'Iberville (population 7,288) [2] with its first local service. Wiggins (population 3,205) would continue to be served by AM Station WIGG. Petitioner states that from his specified site, Channel 250C2 at D'Iberville complies with the Commission's spacing requirements.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. We note that D'Iberville is located within the Biloxi-Gulfport, Mississippi Urganized Area as defined by the U. S. Census. We question whether D'Iberville should be credited with all the aural services licensed to the Biloxi-Gulfport Urbanized Area. Petitioner is requested to submit information showing that D'Iberville is deserving of a first local service preference and that the change in community will provide a preferential arrangement of allotments. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094 (1990). The Request for Supplemental Information does not afford an opportunity to file counterproposals.

4. Interested parties may file comments on or before **August 5, 1991.** Additionally, a copy of such comments should be served on petitioner's counsel, as follows:

David D. Oxenford
Lisa C. Wilson
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Public Notice was given on March 19, 1990, Report No. 1811 (RM-7321).

[2] Population figures are taken from the 1980 U.S. Census.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-597

In the Matter of

Amendment of Section 73.202(b),	RM-7118
Table of Allotments,	RM-7321
FM Broadcast Stations.	
(Wiggins and D'Iberville, [1]	
Mississippi)	

FIRST REPORT AND ORDER

Adopted: May 30, 1991; Released: June 12, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8791 (1989), proposing the substitution of Channel 250C2 for Channel 250A, Wiggins, Mississippi, and modification of the construction permit for Station WOTC, Channel 250A, to specify the higher class channel (BPH-860918OB). The *Notice* was issued in response to a petition filed by John F. White ("petitioner"). [2] Petitioner filed comments restating his interest in the allotment of Channel 250C2 at Wiggins. Petitioner also filed a counterproposal. [3]

2. Petitioner's counterproposal requests the substitution of Channel 250C2 for Channel 250A and a change of the community of license from Wiggins to D'Iberville, Mississippi, providing that community with its first local transmission service. Based on the information provided, we are unable to determine if the allotment at D'Iberville would result in a preferential arrangement of allotments. *See Amendment to the Commission's Rules Regarding Modification of FM & TV Authorizations to specify a new Community of License*, 4 FCC Rcd 4870 (1990), *pet. for recon granted in part*, 5 FCC Rcd 7099 (1991). Therefore, we are issuing a separate *Request for Supplemental Information* affording petitioner an opportunity to submit information with regard to the change of community of license from Wiggins to D'Iberville. *See Ladysmith and Hallie, Wisconsin*, 6 FCC 111 (1991). However, we do not believe the public interest would be served by delaying approval of the uncontested Wiggins channel upgrade until after the resolution of the issues in the *Request for Supplemental Information*.

3. We believe the public interest would be served by substituting Channel 250C2 for Channel 250A at Wiggins in order to provide the community with a wide area FM broadcast service. As indicated in the *Notice*, Channel 250C2 can be allotted to Wiggins consistent with the Commission's spacing requirements at petitioner's specified site 20.5 kilometers (12.7 miles) south of the community. [4] We will authorize a modification of petitioner's construction permit for Station WOTC to specify operation on Channel 250C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 29, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Wiggins, Mississippi	250C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WOTC, Wiggins, IS MODIFIED to specify operation on Channel 250C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED with respect to RM-7118.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of D'Iberville has been added to the caption.
[2] John White assigned the construction permit to a corporation in which he is the majority shareholder. The assignment of the construction permit was granted on December 13, 1989, and consumated on December 15, 1989 (BAPH-891122GM).
[3] Public Notice of the counterproposal was given on March 19, 1990, Report No. 1811 (RM-7321).
[4] The coordinates for Channel 250C2 at Wiggins are 30-40-23 and 89-09-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-532

In the Matter of

Amendment of Section 73.202(b), RM-7010
Table of Allotments,
FM Broadcast Stations.
(Brawley and El Centro,
California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1991; Released: June 12, 1991

By the Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 4 FCC Rcd 8334 (1989), issued at the request of Brawley Broadcasting Company ("petitioner"), licensee of Station KWST(FM), Channel 233B, Brawley, California, proposing the reallotment of its channel to El Centro, California, and modification of its license accordingly. No comments were filed by the petitioner or any other party.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. In this instance, the petitioner expressed no such interest in pursuing the proposed reallotment of Channel 233B from Brawley to El Centro, California, and therefore, we shall dismiss the proposal. *See Fort Ann, New York*, 6 FCC Rcd 907 (1991), *Woodsville, New Hampshire*, 6 FCC Rcd 609 (1991), *Bridport, Vermont*, 5 FCC Rcd 6172 (1990), *Joshua Tree, CA*, 4 FCC Rcd 3801 (1989), and paragraph 2 of the Appendix to the *Notice*.

3. Accordingly, IT IS ORDERED, That the petition of Brawley Broadcasting Company (RM-7010), requesting the reallotment of Channel 233B from Brawley to El Centro, California, and the concomitant modification of its license for Station KWST(FM), IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-571

In the Matter of

Amendment of Section 73.202(b), RM-7033
Table of Allotments,
FM Broadcast Stations.
(Benton, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1991; Released: June 12, 1991

By the Chief, Allocations Branch:

1. At the request of Stonewood Communications Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8587 (1989), proposing the allotment of Channel 226A to Benton, Tennessee, as the community's first local FM service. Petitioner filed comments and reply comments restating its intention to apply for the channel, if allotted. CBS Broadcast Group ("CBS"), licensee of Station WWZZ(FM) [formerly WCKS(FM)], Channel 226A, Karns, Tennessee, filed comments supporting a conditional allotment of Channel 226A to Benton and supplemental comments. [1]

2. In its comments, CBS states that it filed an application to increase Station WWZZ(FM)'s power to 6kW. It notes that Channel 226A at Benton would be short-spaced to its application if allotted at the coordinates proposed in the *Notice* (35-09-54 and 34-39-35). CBS requests that the Benton allotment be conditioned to provide for Station WWZZ(FM)'s increase in power.

3. In supplemental comments, CBS submits letters representing an agreement between the principals of CBS and the petitioner requesting a change in the reference coordinates of the Benton allotment from those proposed in the *Notice*. CBS states the new coordinates will enable a prompt implementation of improved facilities at Station WWZZ(FM) and provide for a speedily implementation of the Benton allotment.

4. Based on the information before us, we believe that the public interest would be served by allotting Channel 226A to Benton, Tennessee, as the community's first local FM service. We note that CBS has received a construction permit for Station WWZZ(FM) at the site specified in its application. Channel 226A can be allotted to Benton at the coordinates suggested in CBS's supplemental comments, and agreed to by the petitioner, with a site restriction of 13 kilometers (8.1 miles) south to avoid a short-spacing to Station WWZZ(FM), Channel 226A, Karns, Tennessee. [2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 29, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Benton, Tennessee	226A

6. The window period for filing applications will open on **July 30, 1991,** and close on **August 29, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Although untimely filed, we will consider CBS's supplemental comments because the comments will assist in resolving a conflict in this proceeding.

[2] The coordinates for Channel 226A at Benton are North Latitude 35-04-00 and West Longitude 84-43-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-437

In the Matter of

Amendment of Section 73.202(b), RM-7284
Table of Allotments,
FM Broadcast Stations.
(Marion and Orrville, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1991; Released: June 12, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 5801 (1990), issued in response to a petition filed on behalf of Marion Radio, Inc. ("petitioner"), permittee of Station WJAM-FM, Channel 248A, Marion, Alabama, proposing to reallot Channel 248A to Orrville, substitute Channel 247A for Channel 248A, and to modify its construction permit accordingly. Petitioner filed supporting comments reaffirming its intention to apply for Channel 247A if allotted to Orrville. No other comments were received.

2. In support of its proposal petitioner asserts that if allowed to relocate to Orrville and to substitute channels, as proposed, it would enable petitioner to operate unbuilt Station WJAM-FM with maximum Class A facilities, a benefit from which it is presently precluded at Marion.[1] Further, petitioner advises that although Orrville (population 349) [2] is in close proximity to Selma (population 26,684), and both communities are the only incorporated municipalities located in Dallas County (population 53,981), 27,297 of the county residents reside outside of the Selma area. Thus, petitioner states that the number of persons residing in the Orrville area is greater than the population distribution throughout the remainder of the county. In this regard petitioner advises that a population count by Data World reveals that a full Class A facility at Orrville would provide 60 dBu service to 52,696 persons. If Selma's population is excluded from the proposed coverage area, petitioner states that its proposal would provide coverage to 26,012 residents. In contrast, petitioner claims that if it commenced operation from its currently authorized site on Channel 247A at Marion (population 4,467), its proposed 60 dBu service contour would encompass only 13,541 persons. Therefore, petitioner asserts that its proposal, if adopted would provide an improved service to an additional 12,471 persons within its projected 1.0 mV/m service contour. [3]

3. We believe the public interest would be served by realloting Channel 248A from Marion to Orrville, substituting Channel 247A for Channel 248A, and modifying petitioner's construction permit for unbuilt Station WJAM-FM to specify operation on Channel 247A, as requested. Our decision is based on the petitioner's showing that the reallotment to Orrville will result in a preferential arrangement of allotments, and the fact that Station WJAM-FM will be able to operate as a full 6 kW facility. Orrville will be provided with its first local aural transmission service, while Marion will continue to receive local aural service from Station WAJO(AM). Therefore, pursuant to the provisions of Section 1.420(i) of the Commission's Rules, we will modify the construction permit issued to petitioner for Station WJAM-FM to specify operation on Channel 247A at Orrville, Alabama, in lieu of Channel 248A at Marion, Alabama. Channel 247A can be allotted to Orrville at the petitioner's specified site located 8.2 kilometers (5.1 miles) east of the community, [4] consistent with the minimum distance separation requirements of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 29, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Marion, Alabama	--
Orrville, Alabama	247A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Marion Radio, Inc. for Station WJAM-FM, IS MODIFIED effective **July 29, 1991,** to specify operation on Channel 247A at Orrville, Alabama, in lieu of Channel 248A at Marion, Alabama, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

[1] Channel 248A at Marion is limited to 3 kW due to spacing constraints on the co-channel to Station WABB(FM), Mobile, Alabama, and on the first adjacent channel Station WEZZ(FM), Channel 249A, Clanton, Alabama.

[2] Population figures used herein were taken from the 1980 U.S. Census.

[3] In view of the fact that Orrville is smaller than Marion, we tentatively concluded in the *Notice* that this proposal should be considered pursuant to the Commission's "quiet village" doctrine. *See Debra C. Carrigan,* 100 FCC 2d 721, *recon. denied,* 101 FCC 2d 218 (1985), *review denied,* 104 FCC 2d 826 (1986). In retrospect, we believe that determination is not applicable in the context of this proceeding, and therefore, no discussion thereon is warranted.

[4] Coordinates at the petitioner's specified site for Channel 247A at Orrville are 32-18-00 and 87-09-30.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-151

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to permit VHF Marine Channel 9 to be used as a second calling channel.

NOTICE OF PROPOSED RULE MAKING

Adopted: May 24, 1991; Released: June 12, 1991

Comment Date: August 2, 1991
Reply Comment Date: August 19, 1991

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rule Making (Notice), we propose to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to permit the use of VHF Marine channel 9 as a second calling channel by noncommercial vessels in the Maritime Radio Services.[1]

II. BACKGROUND

2. In the Maritime Radio Services, VHF channels in the 156-162 MHz band are used by ship stations to communicate with other ship stations or with coast stations. Channels are made available according to the type of communication and the nature of the ship's operation. For example, channels are available for safety communications, calling, control of ship movement and navigational purposes. Additionally, channels are available for public correspondence use. There are two channels currently available for calling. Channel 70, 156.525 MHz, is available for use as an intership, ship and coast general purpose, distress and calling frequency using Digital Selective Calling (DSC).[2] Channel 16, 156.800 MHz, is internationally designated as the distress, safety and calling frequency for ship, public and private coast stations. As such, it is intended to be used to send and receive messages pertaining to the safety of life and property from ship-to-ship, or ship-to-shore. It is also, however, used extensively as a calling channel. *See* Section 80.373(f) of our Rules, 47 C.F.R. § 80.373(f).

3. Ships equipped with VHF stations for compliance with the Communications Act of 1934, as amended (Communications Act), the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9700, or the Agreement Between Canada and the United States for the Promotion of Safety on the Great Lakes by Means of Radio, T.I.A.S. 7837, amended T.I.A.S. 9352, are required to maintain a watch on channel 16 when the station is not being used for other traffic. United States ship stations voluntarily equipped with a VHF station are required to maintain a watch on channel 16 when the station is turned on and not being used for other traffic. The United States Coast Guard (USCG) maintains an aural watch on channel 16, makes preliminary announcements of maritime safety broadcasts, and responds to distress calls made on this channel.

III. DISCUSSION

4. The continuing increase in the pleasure boating population [3] has resulted in considerable congestion on VHF maritime channels. The congestion is especially heavy on the channel 16 calling channel in urban boating areas. For example, the most common complaint received by the Commission related to marine radio usage concerns congestion on marine VHF channel 16.[4] Further evidence of this congestion is shown in a recent Commission study on maritime communications in Boston Harbor, Boston, Massachusetts.[5] The study, conducted by the Commission's Field Operations Bureau, shows that during a sampling period, there were 98.1 transmissions per hour over a 22 hour period in the Boston Harbor area. Further, the study indicates that during peak hours of use, there were as many as 689 transmissions per hour on channel 16. Congestion on channel 16 resulting from increased calling lessens the likelihood that distress messages will be heard by other vessels.

5. One way to reduce the congestion on channel 16 is to allow another channel, one in addition to channel 16, to be used for calling. This would reduce congestion on channel 16 thereby increasing safety by making it easier to hear distress calls. The U.S. Coast Guard concurs with the concept of a supplemental calling channel as an interim measure until full implementation of Digital Selective Calling (DSC). Further, this concept of using a second calling channel to increase maritime safety is supported by the Chairman of the Subcommittee on Coast Guard and Navigation.[6]

6. For these reasons, we are proposing to amend the Rules to permit the use of channel 9 as a second calling frequency nationwide for private coast stations and all noncommercial vessels, *e.g.* recreational boats.[7] Such use would be in addition to the use of Channel 16. Under our proposal, Channel 16 would continue to be the primary safety and distress channel to be used by all vessels and the calling channel for use by commercial vessels. Routine calling by private coast stations and noncommercial vessels, either intership, ship to coast or coast to ship, would be permitted on channel 9. Additionally, we are proposing that the requirement that voluntarily equipped noncommercial vessels monitor channel 16 be amended to permit such noncommercial vessels to monitor channel 9 for calling purposes.

7. To aid us in a final determination in this matter, we are conducting a study in cooperation with the U.S. Coast Guard on the effect of using marine VHF channel 9 as a second calling channel in the Boston Harbor and its effect on reducing congestion on channel 16.[8] We will use the results of that study, which will be placed in the record of this proceeding, and the comments we receive in this proceeding to determine any future action. Because we are concerned about what effect, if any, this proposal will have on overall marine safety we seek specific comments on our proposal pertaining to the use of a second calling channel and its effect on safety.

8. Finally, we note that there are over 500 private coast stations currently authorized to operate on channel 9.[9] We propose that such stations be permitted to continue operation on channel 9. We will work with licensees who wish to find alternative frequencies to use and will waive any applicable modification fee.

IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

9. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), our initial analysis is as follows:

Reason for Action

10. We propose to permit the use of channel 9 as a nationwide secondary calling channel on VHF Maritime radio. This proposal is designed to promote the safety of life and property at sea.

Objectives

11. This proposed rule will reduce congestion on channel 16, designated as "Distress, Safety and Calling," by permitting the use of an alternate calling channel for routine calling by private coast stations and noncommercial vessels, *e.g.* pleasure boats.

Legal Basis

12. The proposed action is authorized under Sections 4(i), 8(d)(2), 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 158(d)(2), 303(f) and (r).

Reporting, recordkeeping and other compliance requirements

13. The proposed channel for second calling is channel 9, presently designated as a "Noncommercial" channel, reserved for ship-to-ship and ship-to-shore communications. If this proposal is implemented, private coast stations currently authorized to use channel 9 might request an alternative channel. The reassignment of a frequency requires the filing of an FCC application for modification. We have proposed to waive the application fee required by stations wishing to change frequencies before the end of their license term and will work with the stations affected by this proposal in finding a new frequency.

Federal rules which overlap, duplicate, or conflict with these rules

14. These proposed rules do not overlap, duplicate, or conflict with other Federal rules.

Description, potential impact, and number of small entities involved

15. We have included an Initial Regulatory Flexibility Analysis in this document because we cannot, at this juncture, determine with any specificity the number of private coast stations affected by this proposal that might choose to change frequencies, or the cost or extent of disruption of service that this proposal might cause to these stations. We are, however, soliciting comments on this matter and expect to determine with more certainty in the Final Regulatory Flexibility Analysis the impact upon the coast stations presently operating on channel 9.

Any significant alternatives minimizing the impact on small entities and existing licensees and consistent with the stated objectives

16. Other marine VHF channels were considered for designation as a second calling channel. No other significant alternatives that would minimize the impact on small entities exist.

V. PROCEDURAL MATTERS

17. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolutions of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

18. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

19. Authority for issuance of this Notice is contained in Sections 4(i) and 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 158(d)(2), 303(f) and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§ 1.415 and 1.419) interested parties may file comments on or before **August 2, 1991,** and reply **August 19, 1991** comments on or before. Extensions of time are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be

sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C.

VI. PAPERWORK REDUCTION ACT STATEMENT

20. The proposal contained herin has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - Stations in the Maritime Services.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.373(f) is amended by adding new footnote 15 to the noncommercial table to read as follows:

§ 80.373 Private communications frequencies.

* * * * *

(f) * * *

Frequencies in the 156-162 MHz band

Channel designator	Carrier Frequency (MHz) Ship transmit	Carrier Frequency (MHz) Coast transmit	Points of communication (Intership and between coast and ship unless otherwise indicated)
* * * * *			
Noncommercial			
* * * * *			
09[15]	156.450	156.450	

* * * * * [15] 156.450 MHz is available for intership, ship and coast general purpose calling by noncommercial operators.

* * * * *

3. Section 80.369 is amended by adding a new paragraph (e)(4) to read as follows:

§ 80.369 Distress, urgency, safety, call and reply frequencies.

* * * * *

(e) * * *

(4) The frequency 156.450 MHz is available for intership, ship and coast general purpose calling by noncommercial operators.

4. Section 80.310 is amended by adding a second sentence to read as follows:

§ 80.310 Watch required by voluntary vessels.

* * * Noncommercial vessels may alternatively maintain a watch on 156.450 MHz.

FOOTNOTES

[1] In the Maritime Radio Services, a calling channel is used as a gateway to other working channels. That is, a ship listens on the designated calling channel for a call, acknowledges the call on that channel and then switches to a working channel to continue its communication.

[2] Digital selective calling (DSC) is a signalling system that can be used to establish contact with a station or group of stations in the maritime radio services. DSC will allow ship or shore stations to call one another individually and provides an improvement over the current method of establishing radio contact which requires a ship operator to (1) be on duty, and (2) be monitoring for a call. The DSC system, therefore, promotes additional safety and more efficient use of the spectrum. DSC will eventually be an integral part of the Global Maritime Distress and Safety System (GMDSS).

[3] Recreational boats typically are not required by Commission regulation to carry radio equipment. Such vessels may and often do, on a voluntary basis, carry such equipment and use the

maritime VHF channels assigned for non-commercial operations. There are currently over 500,000 voluntary ship stations licensed by the Commission.

[4] Boaters are keenly aware of the problem of increasing congestion. One Michigan citizen writes: "a great many boats . . . use channel 16 to call the marina of their choice to inquire about the availability of dockage. During heavy vacation weeks and on weekends throughout the summer, this traffic becomes very intense . . . One of the effects of this intense level of traffic is that should there be a real emergency, it may be difficult to use channel 16 for its true intended purpose." *See* letter dated December 2, 1987, from Thomas R. Reinsma of Grand Haven, Michigan to Commander Danielson, 9th District United States Coast Guard with copy to Chairman, Federal Communications Commission.

[5] *See* FY-88 Boston Marine Safety Project Report (Jan. 26, 1988).

[6] On April 25, 1990, Congress introduced a bill proposing an appropriation for land-based Coast Guard search and rescue stations to enhance the capability of the Coast Guard to locate and identify marine VHF distress signals. In response to testimony by Richard M. Smith, Chief of the Field Operations Bureau, Congressman Billy Tauzin, Chairman of the Subcommittee on Coast Guard and Navigation of the Committee on Merchant Marine and Fisheries, wrote to Chairman Sikes on August 9, 1990, indicating support for implementing a second calling channel. He wrote: "By unanimous consent request, the Subcommittee has directed that I convey a message of strong support for the immediate implementation . . . [of this proposal]."

[7] Section 80.5 of the Commission's Rules, 47 C.F.R. § 80.5, defines commercial vessels and noncommercial communications.

[8] *See* FCC Order, dated August 21, 1990, DA 90-1110.

[9] Section 80.5 of the Commissions Rules, 47 C.F.R. § 80.5, defines a private coast station as "a coast station, not open to public correspondence, which serves the operational, maritime control and business needs of ships."

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-217

In the Matter of

Establishment of Procedures
to Provide a Preference
to Applicants Proposing an
Allocation for New Services

REPORT AND ORDER

Adopted: April 9, 1991; Released: May 13, 1991

By the Commission: Commissioners Marshall and Duggan issuing separate statements.

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1. By this action, the Commission is adopting rules that provide preferential treatment in its licensing processes for parties requesting spectrum allocation rule changes associated with the development of new communications services and technologies. This preference will help to ensure that innovators have an opportunity to participate either in new services that they take a lead in developing or in existing services to which they wish to apply new technologies. The Commission believes that a new "pioneer's preference" will foster the development of new services and improve existing services by reducing for innovators the delays and risks associated with the Commission's allocation and licensing processes.

BACKGROUND

2. On April 12, 1990, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) proposing to implement rules that would reward parties whose proposals for new radio (spectrum-using) services are approved by the Commission.[1] Specifically, the *Notice* proposed that a qualified petitioner first proposing a new service and a reallocation of spectrum for that service be awarded an authorization in the new service. The *Notice* also proposed that applications from other parties seeking to serve the same areas proposed to be served by the petitioner be deferred for six months after grant of the petitioner's license or construction authorization. The *Notice* indicated that a preference would be awarded only when a proposal differed significantly from existing services and requested comment on how novelty should be measured and what degree of novelty should be required in order for the preference to be obtained. The *Notice* tentatively found that such a preference would be lawful and requested comment on that tentative finding.

3. The *Notice* proposed that where a new service would warrant only a single licensee in an area or nationwide, the preference would be granted only to the first qualified party filing a petition for rule making. However, the *Notice* also requested comment on whether multiple preferences should be granted where more than one party submits a petition to allocate spectrum for a similar service and the service lends itself to multiple preferences. Further, the *Notice* sought comment on the applicability of the preference where the proposed new service would share spectrum with an existing service or where the Commission's final decision in a rule making proceeding modifies the innovator's proposal substantially. Where several parties independently develop a new service and there are more innovators than can be accommodated within the relevant spectrum, the *Notice* discussed not awarding any preference. The *Notice* also sought comment on how to deal with overlapping proposals and how the preference would affect domestic and international competition.

4. As an alternative to the proposal to guarantee an innovator the opportunity to be a licensed service provider, the *Notice* requested comment on the appropriateness of giving the innovator a comparative preference in a lottery or hearing. Under the latter approach, commenting parties were requested to address whether, and under what circumstances, other criteria might be able to outweigh the comparative preference. Finally, the *Notice* sought comment on the desirability of permitting innovators receiving a pioneer's preference to transfer their authorizations or licenses to other parties.

5. *Comments.* A total of 59 parties filed comments and/or reply comments in response to the *Notice*. The great majority of these parties favor a pioneer's preference, but express a wide variety of opinion as to the specifics of how the preference should operate. Commenting parties are listed in Appendix B.

DISCUSSION AND DECISIONS

Need for a Pioneer's Preference

6. In the *Notice*, the Commission stated that a pioneer's preference appears desirable for parties undertaking the efforts and risks associated with the development of new radio services and technologies. The Commission expressed concern that the current allocation and licensing processes may make it more difficult and expensive to bring new radio services to the market and that these processes could have an adverse effect on the development and implementation of new services. It also observed that innovators of new services must spend a considerable amount of time and money to develop new services and that several parties have recently indicated their hesitancy to make such investments absent the assurance that they would be able to provide the service and, thus, recoup their investments.

7. Parties supporting the proposal state that there is a strong need for a preference to reward innovators of radio services. Several parties maintain that there is insufficient incentive for an innovator to submit a petition for a new service to the Commission because the innovator is not assured of being awarded a license if the Commission establishes the service. These parties further argue that investors are reluctant to commit funds to the innovator of a new service due to concern that the innovator will receive no advantage over other applicants in the Commission's licensing process. Some of these parties maintain either that the lack of a preference has caused them not to file petitions for new services in the past or that the instant rule making has persuaded them to file petitions only recently.[2]

8. Henry Geller and Donna Lampert (Geller and Lampert) state that the Commission's present method of awarding frequency assignments inhibits the flow of venture capital to technological development involving use of the spectrum, because a successful petitioner simply finds itself in a comparative hearing or lottery with other applicants. Geller and Lampert assert that this situation discourages commitment of time and resources to the initial petition. They therefore recommend that a petitioner be given a significant reward if the petition proves to be in the public interest.

9. FMR Corp. (FMR), an investment management organization, maintains that it can directly attest to the detrimental effect of the present lack of a preference on the provision of investment capital to innovators. According to FMR, the Commission's current rule making and licensing processes have caused it to reject the requests of communications innovators for financing because of the uncertainty of whether any award would be forthcoming to the innovator.

10. American Personal Communications, Inc. (APC) submits that a preference will make developmental work on new communications services economically more attractive and will encourage parties to explore new services by assuring innovators that they will have the opportunity to participate in the provision of new services that they help initiate. APC maintains that if entrepreneurs are not assured of an opportunity to recoup developmental costs and earn profits by providing services that they have developed experimentally, they are likely to seek out other investments offering a higher return. According to APC, therefore, a pioneer's preference is necessary to encourage entrepreneurs to fund desirable new spectrum-using services rather than less desirable, but also less risky, ventures in other areas.

11. Millicom, Inc. (Millicom) maintains that it and others have abandoned pioneering efforts in the past rather than participate in uncertain licensing proceedings. Specifically, Millicom states that it held one of the first three experimental cellular radio licenses in the United States but chose not to seek permanent cellular licenses when the Commission announced that it would award such licenses by lottery without regard to the comparative qualifications and experience of applicants. Millicom states that it shifted its focus to overseas cellular markets and now participates in numerous cellular ventures in other countries throughout the world.

12. The National Telecommunications and Information Administration (NTIA) states that it supports the concept of a preference to reduce some of the uncertainties associated with the spectrum allocation and licensing process, thus leading to a more efficient and fair apportionment of the spectrum. NTIA asserts that the current spectrum allocation and assignment system can be a barrier to the functioning or creation of competitive markets and that a preference could provide some protection to new service providers analogous to that provided under the patent system.

13. Parties opposing a preference for innovators of new radio services argue that it is unnecessary. These parties challenge the argument that any significant radio service has been abandoned due to regulatory delay. They argue that communications innovators are adequately compensated by the patent system and in many cases choose to leave the marketing of radio services to other entities. Opponents also express concern that adoption of a preference by the Commission could promote a rush to file poorly-developed, speculative proposals that would slow the regulatory process and impede the introduction of new services.

14. The American Telephone and Telegraph Company (AT&T) states that, while it supports a pioneer's preference if Commission evaluation of the evidence indicates that a preference is needed to stimulate development of new communications services, it is unaware of any instances where the absence of a preference has caused it not to propose a new service. AT&T also contends that, contrary to the *Notice*, patents can be obtained on communications services and that it and others hold such patents. As an example, it cites its patent on a method for deriving information needed to complete special service calls. AT&T maintains that this patentability of communications services reduces the extent to which a pioneer's preference would provide any incentive toward innovation. Further, according to AT&T, if there is a patent held on a communications service, the Commission's grant of a preference to an entity other than the patent holder could be ineffective to exclude the patentee, thus affording the pioneer little, if any, protection against the patentee's claims.

15. The Ericsson Corporation and Ericsson GE Mobile Communications Holding, Inc. (Ericsson/GE) asserts that it supports the goals of the *Notice* but that it has reservations that a pioneer's preference is the best mechanism for ensuring that new technology is introduced quickly and that innovators are rewarded. Ericsson/GE contends that criteria such as whether a service is "new" or "novel" are too subjective to base the award of a preference.

According to Ericsson/GE, since it will be unclear when a preference will be awarded, the investment community will be no more likely to fund research and development for new technologies than it is now.

16. The Association for Maximum Service Television, Inc. (MSTV) states that it will be extremely difficult to devise and implement a preference proposal that will accomplish the Commission's objective of providing a secure market niche for early proponents and investors. MSTV contends that the practical problems of determining when a preference should be awarded and who should receive a preference raise serious implementation concerns. Of even greater concern to MSTV is a bias against existing spectrum users that it perceives in the preference proposal. According to MSTV, many proposals for new services are likely to involve sharing with existing users, and the constant need of these users to protect their allocation could drain them of resources. Also, MSTV expresses concern that a preference would be biased towards fully integrated communications services such as paging and cellular radio, and against unintegrated services such as broadcasting.

17. The Utilities Telecommunications Council (UTC) maintains that a preference would encourage development of new services without regard to the needs of existing spectrum users. UTC is skeptical that this approach is appropriate because it would not benefit innovators who develop new technologies to make existing services more efficient nor, in UTC's view, would it encourage development of new technologies by entities not interested in providing service. UTC recommends that if a preference is adopted by the Commission, that the award be conditioned upon the innovator's agreement to reimburse existing users of the spectrum if their displacement is required to make room for the operation of the new service.

18. *Decision.* We continue to believe that a pioneer's preference has merit and could foster a host of valuable new technologies and services for the public. The present method of assigning licenses, while beneficial in many respects, appears to have dissuaded in the past at least some potential pioneers from seeking the authorization of new communications services. Of greater concern is the possibility that as future pathbreaking new telecommunications technologies and services are introduced worldwide, American consumers may not have the early benefit of these technologies and services, owing to the belief of innovators that the regulatory burden is excessive in the United States. We are persuaded that a significant reward should be given to induce innovators to present their proposals to the Commission in a timely manner. While we are aware that the potential for a reward could encourage hastily-developed proposals and attract speculators, we believe that a properly-structured pioneer's preference can significantly mitigate these problems.

19. We believe that, as a matter of communications policy, the pioneer's preference will serve the public interest in encouraging new and innovative communications services, and therefore serves communications goals that stand independent of the patent laws. Regarding AT&T's contentions about the patentability of communications services, it is our understanding that such patents are applicable only to very specific services such as the call processing method cited by AT&T. The instant rule making is addressing an entirely different matter, namely, broad-based radio services. [3] We believe that while portions of a broad-based radio service may be patentable, including both equipment and specific services, such as call protocols, the entire broad-based service would not be. In any event, however, we do not intend to award a pioneer a nationwide monopoly on a service and thereby exclude others from providing that service. Instead, we will permit an otherwise-qualified recipient of a pioneer's preference to apply for a license without facing competing applications, while at the same time not excluding others who also wish to provide the service. This subject is discussed in more detail under the section *Nature of Preference, infra.*

20. We also reject the argument of the opposing parties that a preference will be insufficient to attract financial support to the innovator because it will not be based on well-defined, quantitative criteria. Given our decision to adopt a standard for awarding a preference, we believe that the financial community will generally be able to judge whether an applicant's proposal is sufficiently innovative and valuable to warrant investment, just as it is generally able to judge whether a proposed business venture in other areas is viable. Furthermore, we intend to make an early initial determination of whether a preference will be awarded, as discussed under the section *Timing of Preference Award, infra.*

21. Finally, we reject the argument that a preference will adversely impact existing services or will be biased for or against certain types of services. In determining whether to grant the underlying allocation or rule change request, one of our most important considerations will be any possible impact on existing services and the public they serve. A new service or rule will not be granted unless we find that the overall public interest is served, and not just the special interest of an innovator or those who would be served by the innovator's proposal. Regarding a bias for or against certain types of services, we emphasize that a pioneer's preference will be available to common carriers, private entities, and broadcasters, and available without discrimination to new entities and existing licensees. We find no *a priori* reason to believe that any of these service categories will benefit at the expense of others.

22. We recognize that a pioneer's preference could be structured in a number of different ways. In this regard, supporters of a preference are far from unanimous in their recommendations of how it should operate. We believe, however, that failure to implement a preference for fear that it may not be perfectly structured represents a far greater detriment to the public interest than implementing an imperfect preference. Accordingly, we are adopting rules to provide for preferential treatment in our licensing procedures of parties proposing spectrum allocation rule changes associated with the introduction of new communications services. The remaining discussion addresses implementation issues.

Nature of Preference

23. In the *Notice*, the Commission proposed to provide a party first proposing a service through a spectrum allocation rule change the right to obtain a license in that service. This would, of course, be contingent on the Commission's decision to reallocate spectrum and authorize the new service. The Commission also proposed to defer granting applications from entities seeking facilities that are meant to serve the same areas as those proposed in the innovator's application for six months after the grant

of any licenses or authorizations to construct to the innovator. As an alternative, the Commission sought comment on whether it might be more appropriate to give an innovator a comparative preference in a lottery or hearing. In the case of a hearing, the Commission stated that the preference could be balanced against other criteria that are normally considered when applicants are considered comparatively, such as technical qualifications.

24. The majority of commenting parties agree that the award of a license to the pioneering entity should be guaranteed; *i.e.*, a dispositive preference. Many of these parties also argue that the pioneer should have a headstart of at least six months over other potential licensees. Others argue that only a comparative preference should be given or that there should be no headstart for the pioneer.

25. Parties that favor the guarantee of a license to the pioneer maintain that a guarantee is necessary to ensure that proposals for radio services will be forthcoming. Geostar Messaging Corporation (GMC) asserts that an entity who petitions successfully for a spectrum allocation for a new service should not have to compete for a license. Metricom, Inc. (Metricom) states that a guarantee would give maximum encouragement to innovators. Orbital Communications Corporation (ORBCOMM) states that the most critical factor an entrepreneur must assess in deciding whether to proceed with the development of a spectrum-dependent service is the likelihood that it will receive a license and recover its costs. ORBCOMM states that it does not believe that a comparative preference would provide an adequate incentive for innovation since the pioneer would still face a significant risk of being unable to obtain a license and would also be subject to potentially major costs and delays.

26. Parties that oppose a dispositive preference maintain that such a preference would excessively reward a pioneer. GTE Service Corporation (GTE) states that many factors in addition to a pioneer's preference need to go into Commission determinations about a new service and the public interest benefits of the service. According to GTE, these factors include the amount of spectrum required for the service, demand for the service, spectrum sharing, technical issues, eligibility criteria, financial qualifications, state regulatory issues, methods for license assignment, etc. Therefore, GTE recommends that a comparative preference be awarded and that it be used as only one factor in the overall evaluation of a license application. McCaw Cellular Communications, Inc. (McCaw) agrees, stating that a preference recognizing pioneering efforts within the comparative hearing process is consistent with the Communications Act, the Supreme Court decision in the *Ashbacker* case,[4] and the public interest. It asserts that a preference that forecloses consideration of all competing mutually exclusive applications or affords an exclusive headstart must be predicated upon compelling public interest findings to meet the *Ashbacker* standards.

27. The law offices of Murphy & Malone (Murphy & Malone) argue that in fashioning any preference, the Commission should take account of U.S. Supreme Court decisions invalidating any attempt to create a patent-, trademark-, or copyright-like remedy outside the provisions of U.S.C. Title 15, Chapter 22 (Trademarks), Title 17 (Copyrights), and Title 35 (Patents). In Murphy & Malone's view, the Commission may not grant an exclusive right to practice an innovation--patentable or not--for either a definite or indefinite period, but may grant comparative preferences.

28. Parties that favor a headstart maintain that such an advantage is necessary to ensure that the innovator receives a sufficient reward to justify its initial expenditures. Pacific Telesis Group (Pacific) states that once the entire licensing plan is established, a six month headstart is fair as a reward for the innovator and provides a reasonable amount of time for the innovator to establish its service and recover some of its cost. Metricom agrees that a headstart is necessary, but asserts that six months might not be long enough to offer the proper incentive for innovators to recover their research and development costs and to reward those who develop new services. Matrix Personal Communications, Inc. (Matrix) supports a headstart that would begin on the expiration date of the innovator's authorization to construct, and thereby provide the innovator up to a 12-24 month headstart.

29. Millicom suggests that a pioneer be entitled to an exclusive license for at least one year in the areas in which it holds experimental licenses or for the first service area where the Commission issues a license for the new service or technology. Further, according to Millicom, the pioneer should receive a comparative advantage for any other license in the new service or technology for which the pioneer applies, irrespective of geographic location. Strother Communications, Inc. (SCI) states that because a new technology or service usually involves a significant lag time prior to widespread acceptance, initial operations are not profitable. In SCI's view, therefore, a pioneer should receive a reasonable period of protection from competition. SCI suggests that this headstart be three years, but that it automatically terminate in the event the pioneer assigns or transfers its permit within the three year period.

30. Parties that oppose a headstart maintain that such a benefit is unnecessary. Southwestern Bell Corporation (Southwestern Bell) contends that a headstart would be impractical and would be contrary to the Commission's goals of promoting competition and the provision of new services to the public. According to Southwestern Bell, determinations regarding the appropriate time period for any headstart is dependent upon a number of variables, such as equipment procurement delays and problems in securing transmitter/receiver sites, that are beyond the control of the Commission, the pioneer, and other potential licensees. Further, in Southwestern Bell's view, a headstart would create an artificial monopoly and slow the widespread introduction of the new service.

31. Geller and Lampert and the Association of American Railroads (AAR) voice a similar opinion, stating that the assurance that the pioneer will not be subject to competing applications in the application processing stage would be adequate incentive. Further, in AAR's view, it is doubtful that the Commission may properly hold competing applications in abeyance in order to give pioneers a headstart because the ability of the Commission to limit eligibility of applicants in comparative consideration to a class of one does not extend past the processing stage. To delay competing applications from consideration beyond the grant of the competitor's application, according to AAR, would go beyond the need to award a preference to pioneers and would undesirably provide protection against economic competition.

32. *Decision*. We believe the most appropriate course of action is effectively to guarantee the innovating party a license in the new service (assuming it is otherwise qualified) by permitting the recipient of a pioneer's preference to file a license application without being subject to competing applications. Our objective in establishing a pioneer's preference is to reduce the risk and uncertainty innovating parties face in our existing rule making and licensing procedures, and therefore to encourage the development of new services and new technologies. The essence of this risk and uncertainty is that they may not be awarded a license and, therefore, may not be able to take their developmental work into full business operation. The most workable action we can take to reduce this risk is effectively to guarantee an otherwise qualified innovating party that it will be able to operate in the new service by precluding competing applications. Any other approach that would maintain a significant potential that another party could be awarded the right to operate and the innovator could be foreclosed, would severely limit the value of the preference and undercut its public interest purpose. We observe that under the plan we are adopting, an otherwise qualified innovating party would still face the risk that the Commission might not authorize the proposed service. Nonetheless, we believe that such a preference procedure should provide adequate incentive while at the same time ensuring that the Commission's goals of promoting competition and providing new services to the public expeditiously are also met.

33. We conclude that we have the authority to award such a dispositive preference. With respect to *Ashbacker*, as discussed in the *Notice*, the Supreme Court has indicated that when adequately supported by the record in a rule making proceeding, the Commission may establish threshold standards that applicants must satisfy before they are entitled to be eligible for comparative consideration.[5] We believe, as discussed above, there is a strong public interest justification in adopting a dispositive pioneer's preference. With respect to patent issues, the cases cited by Murphy & Malone involve the invalidation under the Supremacy Clause of the Constitution of state laws providing patent-like protection. These cases do not involve the authority of a federal agency to take cognizance of the policies underlying the federal patent, trademark, and copyright laws (to bring new designs and technologies into the public domain) in making public interest decisions regarding the allocation of spectrum and the award of licenses. We believe it is entirely appropriate for the Commission to take cognizance of these policies when making spectrum allocation and licensing decisions. *See La Rose v. FCC*, 494 F. 2d 1145 (1974) (FCC decision remanded for further consideration of accommodation with bankruptcy law policies). Nothing in the Constitution or in the patent, trademark, and copyright laws precludes us from doing so. Indeed, the Communications Act specifically states that the FCC should "encourage the provision of new technologies and services to the public." 47 U.S.C. Section 157(a); *see also* 47 U.S.C. Section 303(g).

34. We further have decided not to provide a headstart for the pioneering entity beyond the *de facto* headstart that may occur due to the time it may take other entities to apply for and receive a license.[6] The commenting parties have convinced us that no additional headstart is necessary. As Southwestern Bell points out, the main effect of a headstart would be to give the pioneer a temporary service monopoly. As Southwestern Bell, Geller and Lampert, and others note, the key public interest benefit of a preference is the assurance to the pioneering entity that, if otherwise qualified, it will receive a license. For the Commission to go beyond this and guarantee the pioneer a temporary service monopoly would not appear to be justified at this time.

Requirements to Obtain Preference

35. The *Notice* proposed that a pioneer's preference be limited to those requesting a spectrum allocation to provide a new communications service. It was anticipated that a petition for rule making would be accompanied by a request for a pioneer's preference. The *Notice* stated that the innovator requesting a preference must provide information concerning its qualifications to be a licensee, its financial condition, and its plan for implementing the service.

36. *Eligible Parties*. Many commenting parties suggest that our eligibility requirements be expanded to include those requesting rule changes that would enable a more efficient use of the spectrum. It is argued that a plan that increases significantly spectrum efficiency is as worthy of a preference as a proposed new communications service. Some claim that the most significant financial risks and innovation occur in the development of technology, and that the Commission should develop policies to give preferences to manufacturers of novel technology. Others contend, however, that to do so would disrupt the competitive equipment market, and that, in any event, manufacturers of devices are already protected by the patent process. Many commenters are concerned that the attraction of obtaining a pioneer's preference will encourage requests for spectrum now allocated to others. It is suggested that only those proposing a service that does not displace existing spectrum users be eligible to obtain a preference.

37. *Decision*. We will require that a person seeking a preference file a rule making petition requesting either that spectrum be allocated to its proposed service or that a rule be amended to accommodate its new technology. We also agree with many of the commenters that our proposal to make only petitioners for spectrum for new services eligible for a pioneer's preference is too restrictive. We are persuaded that both a new radio service and a new technology used to improve an existing service by significantly improving spectrum efficiency should be considered for a preference. In addition, proposals that promise to enable the sharing, or co-use, of allocated spectrum may qualify. By these modifications, we recognize the risks and uncertainties associated with various paths innovation might take not only to create new communications services, but to improve existing ones. Because of the nature of Commission processes, however, we will not consider a request for a pioneer's preference simply for the introduction of a new technology.[7] Essentially, the Commission is a licensing agency. Unless a new technology is associated with a licensable service, there is little opportunity for the Commission to create a system of rewards to encourage its implementation. We agree with those commenters who note that the patent process is sufficient protection and incentive for technology development that is unrelated to a licensable service.

38. Conducting *an Experiment as an Eligibility Requirement*. A number of parties suggest that the pioneer should be required to conduct an experiment as part of the

procedure to qualify for a preference. APC, for example, contends that requiring an experiment would help guarantee that the preference is awarded to parties actually risking significant resources and capital in developmental efforts. Southwestern Bell states that an experimental period would allow the innovator to test and refine the new service and its supporting technology so that both the petition seeking a spectrum allocation and the preference application are reasonable and well-supported. Cylink Corporation urges that the Commission require the pioneer to demonstrate the technical feasibility of the proposed new service via an experiment and submit data from a limited market study using prototype technology. Telephone and Data Systems, Inc. (TDS), on the other hand, maintains that a grant of an experimental authorization should not be considered a basis for awarding a preference. According to TDS, the fact that a new service concept may have been developed in a laboratory setting rather through field testing should not make any difference if the new service has superior merit.

39. *Decision*. We agree with those commenting parties that argue that an experiment can provide meaningful information with regard to the new service or technology. We also concur that an experiment would provide further evidence that a party has expended significant resources and capital in the development of the new service or technology. One of the tenets behind the Commission's pioneer preference proposal is to reward such entities taking the significant risks involved in technical innovation. At the same time, we also agree that an experimental authorization may not be a prerequisite in every circumstance. One can envision instances where significant technical and new service advances can be developed with little or no field testing required or where it is best to conduct the testing in confined or remote areas. For example, it may be necessary only to test the robustness of a new technology or to determine its interference potential, but not to conduct an area-wide evaluation of the service. It may even be that, in a given case, the marketability of a new service will be so apparent that no experiment is required.[8] It can be assumed that, in most cases, a petitioner will find it necessary to conduct an experiment. The results of an experiment would provide the Commission with information that would help us conclude that a proposed allocation or reallocation of spectrum is in the public interest. We conclude, therefore, that, although in most cases, performing an experiment will be a valuable exercise and may be necessary to provide sufficient information for the Commission to make its public interest determination, we will not require an experiment to be performed as a prerequisite to obtaining a pioneer's preference. However, in cases where an experiment is not performed, we will require the petitioner to accompany its preference request with a demonstration of the technical feasibility of the new service or technology.

40. *Financial and Other Eligibility Requirements*. Commenters have also persuaded us not to require that those seeking a pioneer's preference submit a financial showing as proposed in the *Notice*. We concur with those concerned that such a showing could negatively impact some smaller companies. An applicant who develops a viable proposal will be able to attract financial support at the time the Commission awards a preference. Indeed such an eventuality would be proof, at least in part, that our preference process is having the desired effect.

41. Requiring some level of technical qualifications also appears to be unnecessary. A decision to award a preference will have been based upon an evaluation of the applicant's proposal and, to the extent technical innovation is an issue, the applicant's qualifications should reveal themselves. All parties should note, however, that while financial and technical qualifications are not examined in awarding a pioneer's preference, there may very well be such qualifications (and others) for obtaining a license.

42. The petition for rule making, the request for a pioneer's preference, and any experimental license application will all be treated as separate proceedings, because of the differing *ex parte* requirements, although for convenience purposes they may be addressed by the Commission in a single document. Any experimental license application and the request for a pioneer's preference are adjudicative proceedings under our *ex parte* rules, *see* 47 CFR section 1.1202(d). Accordingly, upon the filing of a formal opposition, *see* 47 CFR section 1.1202(e), those matters will become "restricted" proceedings in which *ex parte* presentations are prohibited.[9] *See* 47 CFR section 1.1208(c). The petition for rule making to allocate spectrum will be an exempt proceeding under the *ex parte* rules, 47 CFR section 1.1204(a)(2).

Determination That Preference Is Warranted

43. In the *Notice*, we proposed that decisions to award a pioneer's preference be determined on a case-by-case basis, rather than by application of rigid criteria. Recognizing that the key determinant of whether a pioneer's preference would be awarded is the degree to which a proposed service or technology is "new" or "novel," in our *Notice* we sought comment on how novelty could be measured, and what degree of novelty should be expected. Commenting parties express a wide difference of opinion, with some disagreeing even that novelty is an appropriate criterion on which to base an award. Many parties contend that specific criteria should be used to provide an objective standard to judge applications. Others argue that more general criteria should be used to provide flexibility to the Commission.

44. Those parties commenting in favor of specific criteria argue that since a preference is intended to encourage the investment of money and energy to develop new ideas, the Commission's standards must have certainty. Vague criteria, they argue, will do little to encourage risk taking, and might make it more likely that applications for a pioneer's preference will be contested.

45. Various criteria for determining the novelty of a service or technology have been suggested. Some are more specific than others. Many of those commenting think that in addition to providing the public with some ability to communicate that it has not previously enjoyed (at least, through use of the spectrum) a service might be considered new if it meets an unserved need, or if it brings competition into a market where competition has been limited. Others suggest that preferences should be granted for services offering broader public access to some existing service. Commenting parties discuss whether innovative technologies should be defined by patent guidelines (whether, for instance, the claimed advance would not have been obvious to one of ordinary skill in the art). Others would measure innovation by examining specific technical advances, whether off-the-shelf equipment is re-

quired, whether use of the proffered technology would yield some cost efficiency, or whether the proposal involves the first practical application of existing theory.

46. Many of those commenting argue in favor of making case-by-case determinations based on general criteria. Such a decision, they contend, would avoid the delays bound to be associated with arguments about the applicability of specific criteria and would better provide the Commission with flexibility to deal with future technologies and services whose features cannot be anticipated.

47. *Decision*. We agree with those commenters who argue that a standard is necessary to provide guidance to innovators and financial institutions as to when a preference might be granted. This standard, however, must be capable of flexible application in order to account for the different forms that innovation can take. Application of this standard to any preference request will, of course, be completed on a case-by-case basis based on a public interest determination. The Commission, in its discretion, will award a pioneer's preference to an entity that demonstrates that it (or its predecessor-in-interest) has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service, *provided*, that the rules adopted for the new or existing service are a reasonable outgrowth of the proposal and lend themselves to the grant of a preference and a license to the pioneer. We believe that awarding a pioneer's preference based on such a standard will provide innovators and financial institutions with sufficient certainty while at the same time ensuring that the Commission can consider and take into account a wide array of innovative services and technology.

48. For purposes of the preference, we will consider the development of an innovative proposal to mean that the petitioner (or its predecessor-in-interest) has brought out the capabilities or possibilities of the technology or service or has brought them to a more advanced or effective state.[10] Generally, we believe that an innovation could be an added functionality, a different use of the spectrum than previously available, or a change in the operating or technical characteristics of a service, any of which involve a substantial change from that which existed prior to the time the preference is requested. Further, technologies that yield efficiencies in spectrum use, speed or quality of information transfer, or spectrum sharing, or which significantly reduce costs to the public, will be given careful consideration. We do not intend these factors to be all inclusive, but rather to provide some guidance to further enunciate the standard noted above. We can emphasize only that we do not intend to bestow preferences casually. An applicant for a pioneer's preference will have a significant burden to persuade the Commission that its proposal has sufficient merit. We recognize that, in ensuring flexibility, our standard is not as precise as some may desire. Nevertheless, we believe the standard is sufficiently clear so as to be workable. Over time, the Commission's decisions will provide further guidance to those seeking a preference.

49. As noted above, we will grant the preference to an applicant who, *inter alia*, proposes to provide either a service not currently provided or a substantial enhancement to an existing service. Examples of a new or enhanced service might include an added functionality provided to a broader group of customers than was previously available or a new technology that permits 1) increased ability to perform an existing work requirement; 2) increased capacity in an existing service; 3) a substantial cost reduction in an existing service; 4) improved quality of an existing service.

50. The Commission is aware that evaluating the merits of claims of technological innovation may be a difficult process. In the context of the comment process on the request for a pioneer's preference, we may wish to seek the opinion of specific individuals--recognized experts in scientific disciplines that are relevant to proposals before the Commission. For this type of "peer review" the staff will determine, on a case-by-case basis, whether, in addition to any comments filed on the request for a pioneer's preference pursuant to Section 1.402(c) of the Commission's Rules, there may be advantages to a more focused solicitation of comments. The product of such a peer review process will be placed in the record of the pioneer's preference request proceeding and evaluated, along with other comments in that proceeding, by the staff.[11] It should be emphasized that the information sought is not intended to be a substitute for the public interest determinations that we must continue to make. Rather, we hope to receive only evaluations of technological proposals and whether we are confronted by true technological advances.

Area of Preference Award

51. The Commission requested comments as to what area of license would be an appropriate award to a chosen innovator. Some parties recommend that a preference award be designated for the area where the innovator has operated an experiment, including a nationwide area, if the service is inherently nationwide. Awarding a preference for the area of the experiment, according to these parties, would result in the benefits of a new service being made available to the public quickly. Others maintain that the innovator should be allowed to use its preference in any market of its choice.

52. A number of commenters urge a more flexible approach. Southwestern Bell, for instance, contends that the Commission should not attempt to adopt a general geographic limitation for services that qualify for a preference since the nature of future services may be obscure. Rather, it recommends that the pioneer be required to identify in its petition for rule making the scope of the area in which it intends to provide service and the rationale for that service area. Based on this input, Southwestern Bell recommends that the Commission make an initial determination of the type of service area best able to serve the public interest for the proposed service. Southwestern Bell also envisions that a pioneer might be granted a preference in more than one area.

53. *Decision*. Licensing policies, including the area to be served, are traditionally matters determined in any rule making proceeding that proposes to allocate spectrum for a new service. (For established services, of course, licensing policies are already clear.) We expect that in a petition for rule making, the petitioner will address itself to the matter of the scope of the license area. Should the petitioner conduct an experiment, particularly a market experiment, it can be expected to choose to perform the experiment in an area commensurate in size with what has been proposed. Should the petitioner be awarded a pioneer's preference and an experimental license, it would certainly be reasonable simply to use the area for which it receives its experimental license as a basis for a

license in the authorized service. We will permit the person receiving a preference to select the one area of licensing that it desires to serve. The area selected will depend on how the Commission report and order defines the area of operation under its rules; *e.g.*, city or region. In cases where the Commission adopts rules defining service areas different than had been proposed or anticipated by the petitioner, we will permit a choice of eventual licensing for the pioneer to be made after a report and order is adopted in the proceeding. In general, we are adopting an approach such that the pioneer's preference would be awarded for the area defined for the service under our licensing rules. For example, if we decide that a service should be licensed on a Metropolitan Statistical Area (MSA) basis, the pioneer's preference, if awarded, would apply to the MSA designated by the innovator.

54. We will generally not grant a nationwide preference or a preference for more than one service area. Our goal is to create an incentive for innovation by establishing a certainty that an otherwise qualified applicant will be able to participate in the proposed service. We must balance this goal against our long-standing desire to encourage diversity in communications services, wherever possible. We believe that granting a pioneer a preference for one area will generally be sufficient incentive to bring its ideas to the Commission. Where a service is inherently nationwide, we will consider granting a nationwide preference. However, we do not believe that granting a preference for more than one service area would usually be necessary to accomplish the purpose of adopting a pioneer's preference.

Multiple Preferences/Deviation of Proposal From Final Service Rules

55. The *Notice* sought comment on whether the Commission should consider granting multiple preferences where more than one party submits a petition to allocate spectrum and request for a pioneer's preference for the same type of service, and the service lends itself to multiple licensees. It further sought comment on the extent to which an innovator's proposal could deviate from the final rules adopted for a service and still qualify for a preference. For example, the Commission might determine to locate the service in a different frequency band than that proposed by the innovator. Similarly, the Commission might allocate less spectrum than requested by the innovator or might modify the service as a result of information developed in the proceeding.

56. Commenting parties express various opinions as to whether multiple preferences should be permitted and how much deviation should be permitted for an innovator to qualify for a preference. Some commenting parties contend that the Commission should award a preference only to the first qualified applicant for a service. To permit otherwise, it is explained, will encourage the filing of competitive applications that will delay the introduction of service. Other parties maintain that, in appropriate circumstances, more than one preference should be awarded. They claim that the possibility of multiple preferences may stimulate diverse technical approaches to a proposed service. Virtually all commenting parties recognize that it is inevitable that a final Commission report and order will differ in some respects from an initiating proposal. They argue that final rules need not precisely track the proposal for a preference to be granted. Indeed, it is noted, often a proposal is refined during the course of a proceeding. Only if the Commission decision is substantially different, it is argued, should the preference be lost. A more liberal view expressed is that it is enough if the applicant has made a valuable contribution for a preference to be awarded.

57. *Decision.* Our objective in this proceeding is to provide incentive to innovators to either bring forth new services or to increase the efficiency of existing services. We are convinced that this objective can best be accomplished by giving otherwise qualified innovative parties an assurance that their efforts to develop a new service or technology will result in a benefit if adopted in some general form by the Commission. We believe that in many services there will be a single, clear-cut innovator, while in other services, it will be difficult to distinguish among several innovative parties. In the latter situations, we find it appropriate to award preferences to each applicant that can meet the eligibility standard for being awarded a preference. For example, if the Commission adopts rules that combine aspects of two or more applicants' proposals or rules that permit the use of two or more applicants' proposed technologies, we believe that more than one preference would be warranted. We recognize that there is a potential drawback to awarding multiple preferences in that some parties who are not truly pioneers may be encouraged to file "copycat" applications in an attempt to gain a preference.[12] However, we will look very carefully at each application to ensure that what is being proposed meets the standard set forth in paragraph 47, *supra*. To the extent that an application is deficient in this respect, no preference will be awarded. Also, in some cases where multiple preference requests are filed, it may better serve the public not to grant any of them.

58. We note that a situation could arise in which the final rules adopted for a service would be so different from all of the service proposals that any preference would be inappropriate. Nevertheless, while we will continue to review our decisions on a case-by-case basis, it will be our general policy to award a preference to any otherwise qualified innovator meeting our standard even if the Commission's final rules for the service are not identical to the innovator's original proposal. However, if the modifications are so significant that the particular innovator does not meet the eligibility standard, we will not award a preference to that innovator. We believe that such an approach should result in providing innovators with the certainty necessary to garner financial support in a timely manner and should ensure that the benefits of the new service can be realized expeditiously by the public.

Timing of Preference Award

59. In the *Notice*, the Commission proposed to set forth its initial determination regarding whether to grant a preference request at the time a notice of proposed rule making (NPRM) on the innovator's proposal is issued. Relatively few commenting parties address this proposal. Some parties support it while others recommend that all action on whether to grant a preference be deferred until the report and order stage of the proceeding.

60. Those arguing in favor of granting a preference when an NPRM is issued point out that early designation is necessary to provide the innovator with continued incentive to pursue its project and raise necessary capital.

Others contend that by not waiting until the end of a proceeding, the Commission would lose the ability to judge a proposal in light of the rules finally adopted.

61. *Decision*. We find that our proposal to make an initial determination of entitlement to a preference at the time the NPRM on the innovator's proposal is issued will best serve the public interest.[13] If we defer this decision to the report and order stage of the proceeding, it will prolong the regulatory uncertainty for the innovator and thereby have a chilling effect on investors' willingness to provide financial support. Our general policy of awarding a preference even if the report and order modifies the proposed service to some extent, as discussed above, will tend to lessen the likelihood that an initial determination to grant a preference would mislead the pioneer and the financial community. Nonetheless, as a situation may occasionally arise wherein a particular service either will not be adopted or will be modified to such an extent that no preference is warranted, a preference grant will not be made final until a report and order on the proposal is adopted by the Commission. If the grant is finalized, any application for a license would not be subject to competing applications.

Transferability of Preference

62. In the *Notice*, the Commission requested comment regarding what rules, if any, should apply when an entity that has received a preference seeks to transfer it. The Commission stated that needless limits on transferability have potential both to chill the innovation process and to retard the commercial deployment of new and innovative ideas. At the same time, the Commission noted there may be a need for Commission rules and policies that seek to minimize any speculation in preferences. The majority of commenting parties support free transferability of preferences, but some express concern about speculation.

63. Several commenters, such as USA Mobile Communications, Inc. II (USA Mobile), Matrix, and ORBCOMM, support the free transferability of a pioneer's preference. Both USA Mobile and Matrix state that the innovator may not be in the best position to exploit and develop its ideas, and that the public would be better served if another party that can introduce and maintain the service were permitted to do so. ORBCOMM states that restricting the pioneer's ability to transfer its preference effectively limits the preference incentives to large companies with vast resources. Other commenters raise concerns that unrestricted transferability will encourage speculative proposals and could lead to trafficking in preferences. Impulse Communications Inc., for example, suggests that the Commission allow an innovating party to sell a substantial financial interest provided there is continued participation by the pioneer in ownership and management. Pacific contends that unlimited transferability prior to construction and initiation of service is not in the public interest. Pacific argues that such an approach could lead to delays in delivery of the service to the public and disruption of the orderly processing of applications.

64. *Decision*. We share the concerns of several of the commenting parties regarding speculation in preferences. It is not our desire to create some new form of negotiable instrument and thereby encourage unjustified petitions from speculators hoping to obtain a thing of value to sell. We do not contemplate a "futures" market in preferences. Requests for preferences will be subject to rigorous review. Demonstrations of technical feasibility will be required. Nonetheless, to further dissuade speculative requests for preferences, we shall not permit the transfer of a bare preference. By this decision, we do not intend to preclude a change of control of a preference attendant upon the sale of a company. To the extent a preference may be regarded as an asset, it may pass, along with other assets, to new ownership should a company be sold.[14] Our decision here is merely that the preference itself may not be a separate object of sale. Any preference sold in violation of this provision will not be recognized in the licensing process.

Relationship of Grant of Preferences to Timing of This Proceeding

65. Several commenting parties address the issue of awarding preferences for proposed services for which experimental applications had been received prior to the adoption of the *Notice*. Some of these parties contend that such "retroactive" preferences should be awarded. Others contend that it would be inappropriate to award such preferences.

66. Local Area Telecommunications, Inc., for example, maintains that the Commission should award the preferences retroactively to entrepreneurs who otherwise qualify for the preference and have sought allocations, filed experimental applications, or undertaken other qualifying activities prior to the completion of the instant rule making. APC agrees, stating that granting a preference to those parties who have applied for or received experimental authorizations would provide an incentive for experimental licensees to carry through with their test programs in a vigorous and effective fashion. To implement this program, according to APC, the Commission should give present licensees and pending applicants 60 days after it adopts a preference policy to submit a showing that they should be entitled to a preference.

67. AT&T disagrees, contending that the Commission's ability to assess the effectiveness of a preference system would be impaired, if not negated, by awarding preferences to past pioneers who had not relied on a preference system in making their proposals.

68. FMR recommends that the Commission maintain a neutral stance toward pending experimental licensees and their eligibility to obtain a preference once a final order in the instant proceeding is adopted. In FMR's view, a preference should not be awarded based on activities that took place prior to adoption of final rules in this proceeding. However, it believes that current experimental licensees should be permitted to file for a preference on the same basis as other applicants after final rules are adopted in this proceeding.

69. *Decision Notice* in the instant proceeding has generated a number of requests with the Commission for a pioneer's preference in various services. Additionally, we have received an exceptionally large volume of experimental applications since adoption of the *Notice*. It appears, therefore, that the instant proceeding has already served to encourage prospective innovators. We believe the most equitable method of treating preference requests or experimental applications that are already on file is to utilize the basic approach recommended by FMR; *i.e.*, to afford those entities who have already filed for a preference or an experimental application no special consideration, but to impose no penalty on them either. Accordingly, we will allow parties who have already filed an application for an experimental license to file a request

for a pioneer's preference under the rules set forth herein. Those entities who have already filed a request for a preference will be required to submit a new request.

70. As discussed above, we will make our initial determination of entitlement to a preference at the time a notice is adopted proposing either a reallocation of spectrum to a new service or an innovative technology that results in more efficient use of an existing service. Therefore, preference requests will be accepted except where an NPRM has already been issued proposing rules for a new service or modifications to rules in an existing service. This means that in Commission proceedings where only a petition for rule making has been received or a notice of inquiry adopted, potential innovators are eligible to file for a preference. In situations where a petition for rule making has been filed or a notice of inquiry adopted, a request for a pioneer's preference may be filed by entities that either filed a petition for rule making proposing a new service or innovative technology or who filed some other request with the Commission (*e.g.*, an experimental license application) proposing a new service or innovative technology. This approach will avoid treating unfairly entities who did not file separate petitions for rule making at a time when doing so did not provide any licensing benefits, but who had come forward with a new service or innovative technology proposal.

Other Issues

71. *Availability of Preference.* Some commenting parties state that the preference should be more easily available to smaller companies than larger ones, should not be available to communications manufacturing or multinational companies, or should not be available for services that are imported from other countries. In this proceeding, we are attempting to encourage the introduction of innovative communications services and technologies from all sources.[15] No party has convinced us that these restrictions are warranted.[16]

72. *Related Patents Held by the Innovator.* Southwestern Bell expresses concern about the possibility of the innovator also controlling related patents. Under this circumstance, according to Southwestern Bell, the innovator might be able to foreclose competitors from providing a new service by refusing to license the related patents to potential competitors. To guard against this possibility, Southwestern Bell recommends that the Commission precondition the preference grant on the requirement that the innovator license any patented technology controlled by it and used in providing the new service to any other entities that are granted a license to provide the service. While Southwestern Bell raises a legitimate concern, we believe the antitrust laws are a more appropriate tool for the prevention of any such anti-competitive activity. Nevertheless, we will consider in appropriate cases the need to condition the grant of a license to a pioneer's preference recipient on a requirement that it license any related patents on a nondiscriminatory basis to other entities providing the same service.

73. *Broadcast Assignments.* Three parties to the instant proceeding, Home Broadcast Company, Edward A. Schober, and James P. Wagner, favor applying a pioneer's preference to the assignment process for commercial broadcast frequencies; in particular, for FM assignments. However, since this proceeding deals only with the development of new communications services and technologies, we find the issue of extension of the pioneer's preference to commercial broadcast assignments to be beyond the scope of our consideration herein.

Summary of Action

74. In summary, we are herein adopting rules to implement a pioneer's preference to foster the development of new communications services and technologies. We will grant a dispositive preference to those innovators who are found eligible for a preference and whose proposals are judged to be sufficiently meritorious. In order to be eligible for a preference, an applicant will be required to submit a request for a pioneer's preference and a petition for rule making requesting either an allocation of spectrum for a new service or a rule amendment to permit use of a new technology. In most cases, we expect that an experimental license application will also be filed. The rule making petition will be placed on public notice and the Commission may solicit, specifically, views of recognized experts. If favorable action is taken on the petition, the Commission will review all material relevant to the preference request and make an initial determination as to whether a conditional preference is warranted. This decision will be made at the time a notice of proposed rule making is issued in the proceeding. Should the Commission determine that there is more than one innovator that meets the standard, multiple preferences will be granted. At the time of the report and order in the proceeding, any pioneer's preference would become final (and its scope determined) if final rules are adopted that are generally similar to the innovator's proposal. Transfer of a preference will not be permitted. Preference requests for any service will be accepted until the time a notice of proposed rule making is issued proposing rules for the service.

FINAL REGULATORY FLEXIBILITY ANALYSIS

75. Pursuant to 5 U.S.C. section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice of Proposed Rule Making* in GEN Docket No. 90-217. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

76. *Need for and Objective of Rules.* Our objective is to encourage innovators, including individuals, small businesses, and large corporations, to develop new spectrum-using services and technologies.

77. *Issues Raised by the Public in Response to the Initial Analysis.* Several parties suggested modifications to the proposals set forth in the *Notice*, although not specifically to the initial regulatory flexibility analysis. As a result, we have modified our proposals as appropriate. For example, we are now permitting a preference for new technologies used to improve an existing spectrum-using service and are not permitting a headstart period for an innovator.

78. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives.* We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to ensure that the public receives the benefits of innovative new services in a prompt manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. The Sec-

retary shall send a copy of this *Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration.

79. Accordingly, IT IS ORDERED, that Parts 1 and 5 of the Commission's Rules and Regulations ARE AMENDED as specified below, effective July 30, 1991. This action is taken pursuant to sections 4(i), 7(a), 303(c), (g), and (r), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 157(a), 303(c), (g), and (r), and 309(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

1. Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 - PRACTICE AND PROCEDURE

2. The authority citation in Part 1 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

3. Subpart C is amended by adding new section 1.402 and revising section 1.403 to read as follows:

Section 1.402 Pioneer's preference.

(a) When filing a petition for rule making pursuant to section 1.401, that seeks an allocation of spectrum for a new service or which, by use of innovative technology, will substantially enhance an existing service, the petitioner may also submit a separate request that it be awarded a pioneer's preference in the licensing process for the service. The preference request must contain pertinent information concerning its plan for implementing the service, the frequencies it proposes to use, the area for which the preference is sought, and must address any existing conflicting licensing rules such as multiple ownership, showing how these rules should or should not apply. The petitioner must demonstrate that it (or its predecessor-in-interest) has developed the new service or technology; *e.g.*, that it (or its predecessor-in-interest) has brought out the capabilities or possibilities of the technology or service or has brought them to a more advanced or effective state. The petitioner must accompany its preference request with either a demonstration of the technical feasibility of the new service or technology, or an experimental license application, unless an experimental license application has previously been filed for that new service or technology. If the petitioner files or has filed an experimental license application, it must specify the area in which the applicant intends to conduct its experiment and whether that is the area for which a preference is sought. In determining in its discretion whether to grant a pioneer's preference, the Commission will consider whether the petitioner has demonstrated that it (or its predecessor-in-interest) has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service. Additionally, the preference will be granted only where rules, as adopted, are a reasonable outgrowth of the proposal and lend themselves to the grant of a preference.

(b) An initial determination on a request for a pioneer's preference will be made at the time of the adoption (if any) of a notice of proposed rule making. A final determination on a request for a pioneer's preference (and its scope) will be made at the time of the adoption (if any) of a report and order adopting new rules. If awarded, the pioneer's preference will provide that the petitioner's application for a construction permit or license will not be subject to mutually exclusive applications.

(c) Any comments on the request for a pioneer's preference shall be filed in accordance with the pleading schedule set forth in section 1.405 of the rules, but not as part of comments on the petition for rule making.

(d) In the event of a conflict between this rule and any rule for a particular service that provides for the filing and consideration of competing applications, this rule shall prevail.

Section 1.403 Notice and availability.

All petitions for rule making (other than petitions to amend the FM, Television, and Air-Ground Tables of Assignments) meeting the requirements of Section 1.401 will be given a file number, and promptly thereafter, a "Public Notice" will be given (by means of a Commission release entitled "Petition for Rule Making Filed") as to the petition, file number, nature of the proposal, and date of filing. If a petition for rule making includes a request for a pioneer's preference, that request will be separately listed in the Public Notice with a separate file number. Petitions are available for public inspection at the Commission's Dockets Reference Room in Washington, D.C.

4. Part 5 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 5 - EXPERIMENTAL RADIO SERVICES (OTHER THAN BROADCAST)

5. The authority citation in Part 5 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply sec. 301, 48 Stat. 1081, as amended; 47 U.S.C. 301.

6. Subpart E is amended by adding new section 5.207 to read as follows:

Section 5.207 Experiments Performed in Conjunction with Pioneer's Preference Applications.

An applicant for a pioneer's preference pursuant to Section 1.402 may file an experimental license application concurrent with a petition for rule making requesting an allocation of spectrum for a new service or a rule amendment to permit use of a new technology. The experimental application should be for a limited geographical area, generally including no more than one Metropolitan Statistical Area.

APPENDIX B

Parties Filing Comments

American Personal Communications, Inc.
American Telephone and Telegraph Company
Ameritech Companies
Association for Maximum Service Television, Inc.
Association of American Railroads
Bellsouth Corp.
Contel Cellular, Inc.
Cylink Corp.
Digital Microwave Corp.
du Treil, Lundin & Rackley, Inc.
EasyPhone, Inc.
Ericsson Corp. and Ericsson GE Mobile Communications Holding, Inc.
FMR Corp.
Forest Industries Telecommunications
Henry Geller and Donna Lampert
Geostar Messaging Corp.
Jerome Gillman
Global-Wulfsberg Systems, Inc.
Graphic Scanning Corp.
GTE Service Corp.
Home Broadcast Company
Impulse Communications, Inc.
International Mobile Machines Corp.
Leslie Taylor Associates
LiTel Telecommunications Corp.
Local Area Telecommunications, Inc.
Matrix Personal Communications, Inc.
McCaw Cellular Communications, Inc.
Metricom, Inc.
Millicom, Inc.
Motorola, Inc.
National Association of Broadcasters
National Association of Business and Educational Radio, Inc.
National Telecommunications and Information Administration
Orbital Communications Corp.
Pacific Telesis Group
Radio Telecom and Technology, Inc.
Satellite CD Radio, Inc.
Edward A. Schober, PE
Southwestern Bell Corp.
Special Industrial Radio Service Association, Inc.
STARSYS, Inc.
Strother Communications, Inc.
Suite 12 Group
Tandy Corp.
Telephone and Data Systems, Inc.
Telocator, Inc.
United Parcel Service
United States Telephone Association
USA Mobile Communications, Inc. II
Utilities Telecommunications Council
James P. Wagner
Joseph A. Wolos
World Eight Broadcasting Limited Partnership

Parties Filing Reply Comments

American Telephone & Telegraph Company
Bell Atlantic
Contel Cellular, Inc.
FMR Corp.
Geostar Messaging Corp.
GTE Service Corp.
LiTel Telecommunications Corp.
Metricom, Inc.
Millicom, Inc.
Mobile Telecommunications Technologies Corp.
Murphy & Malone
NYNEX Corporation
Orbital Communications Corp.
Southwestern Bell Corp.
Strother Communications, Inc.
United Parcel Service
USA Mobile Communications, Inc. II
United States Telephone Association
Volunteers in Technical Assistance, Inc.

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, GEN Docket No. 90-217, 5 FCC Rcd 2766 (1990). This action was in response to a Petition for Rule Making submitted by the Washington Center for Public Policy Research, through its associates Henry Geller and Donna Lampert, on July 14, 1989.

[2] Also, one new company established for the purpose of developing new communications technologies asserts that the issuance of the *Notice* in the instant proceeding has already helped it obtain financing. *See* comments of Impulse Communications, Inc., p. 2.

[3] We find it unlikely that there would be a direct conflict between a patent issued by the U.S. Patent and Trademark Office and a pioneer's preference issued by the Commission.

[4] *See Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). Therein, the Court held that the Communications Act requires that all *bona fide*, competing applications are entitled to comparative consideration.

[5] *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-205 (1956). *See, also, Public Utilities Commission of California v. FERC*, 900 F. 2d 269 (D.C. Cir. 1990); *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989).

[6] In order to ensure that any headstart as a result of a license grant based on a pioneer's preference is limited, we anticipate acting expeditiously on these other applications.

[7] For example, we will not award a preference for a new digital or narrowband technology that promises more efficient use of the spectrum if it is not linked to a specific service.

[8] Nevertheless, we emphasize that preferences will be granted only for innovations of some significance.

[9] The restricted nature of a formally opposed request for pioneer's preference proceeding and any formally opposed experimental licensing proceeding would not limit *ex parte* presentations in the exempt petition for rule making proceeding on whether or not the proposed spectrum allocation is new and innovative and in the public interest. *Ex parte* presentations on who should or should not receive a pioneer's preference or experimental license would be prohibited, however.

[10] The Commission will grant a preference only to persons who have made a significant investment of effort in developing the innovation, although it is not necessary that every aspect of the innovation be developed by the person seeking the preference. By focusing on the developer of the innovation, the Commission may not accord the first filer a preference because the first filer may not be the person who most deserves the preference.

[11] In addition, if a formal opposition to the request for a pioneer's preference has been filed, and that proceeding is thus restricted under the *ex parte* rules, *see* para. 42, *supra*, a public notice will be issued indicating the public availability of any such information provided in response to a staff request. *See* 47 CFR Section 1.1204(b)(7) Note. Parties to the pioneer's preference proceeding could then comment on such information, provided all other parties to the proceeding are served.

[12] Allowance of multiple preferences may result in some cases in mutually exclusive requests by pioneers. The procedures for resolving any such conflicts will be determined in the specific rule making in which they arise.

[13] While, upon issuance of a notice of proposed rule making, the spectrum allocation proceeding will become non-restricted under the *ex parte* rules, *see* 47 CFR section 1.1206(b)(1), the pioneer's preference request (and any further consideration of an initial determination thereon), if formally opposed, will remain a restricted proceeding. *See* para. 42, *supra*.

[14] It should be noted that for a license to be granted to a company holding a preference, that company must possess the requisite eligibility to hold a license according to the rules of the particular service.

[15] Of course, no preference for a license can be granted to a person that does not meet the alien ownership restrictions contained in Section 310(b) of the Communications Act.

[16] We also note that these types of restrictions are not imposed by the U.S. Patent and Trademark Office.

STATEMENT OF COMMISSIONER SHERRIE P. MARSHALL

Re: Establishment of procedures to Provide a Preference to Applicants Proposing an Allocation for New Services

I strongly support encouraging the development of new services and technologies. All too often, our lengthy allocations process has discouraged invention and risk taking on the part of innovators. Unfortunately, I fear this Report & Order may create even further delays in that process. The uncertainties created by our failure to enunciate clear criteria as to what constitutes a new service will undoubtedly make it difficult for innovators to determine if their inventions will qualify for a preference. As a result, virtually all requests for spectrum reallocations will be accompanied by preference requests. Each of those requests will have to be addressed and resolved, thereby further delaying our already snail-like licensing process for new technologies.

I vote for this decision in the hope that my concerns about the new process will prove unwarranted. The pioneer's preference program certainly has the potential to spur innovation and bring new services to the American public. I look forward to seeing its results.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

GEN Docket No. 90-217

Establishment of Procedures to Provide Preference to Applicants Proposing an Allocation for New Services

I write separately to emphasize my concern that holding out to applicants the hope of a *dispostive* preference for a license carries at least some threat of overwhelming our administrative processes. I am willing to consider awarding a "pioneer's preference" occasionally, however--- because rapidly advancing technology promises better communications service, and I am eager to encourage that.

I trust as we go forward with this new venture that we will keep a shrewd eye trained on its dangers as well as its promise. There is the danger of politicizing awards that should be impartial. There is the danger of distracting ourselves with hair-splitting debates about what constitutes real newness, novelty and pioneering. And there is the danger of bogging the Commission down in administrative litigation that instead of speeding, delays its efforts to foster new communications services in the public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-323

In the Matter of

Cincinnati Bell Telephone Company — Transmittal No. 518

Tariff F.C.C. No. 35

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1991; Released: May 24, 1991

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order sets forth the Commission's conclusions with respect to issues raised in the investigation of Cincinnati Bell Telephone Company's (CBT) calling card practices.[1]

2. Based on our review of the record, the Commission concludes that CBT's provision of certain services and information, that CBT currently provides exclusively to American Telephone and Telegraph Company (AT&T), is subject to the requirements of Title II of the Communications Act. Specifically, CBT assigns and maintains in a database telephone line and Revenue Accounting Office (RAO) based account numbers for calling cards used to place calls between points within CBT's service area, as well as calls to points outside CBT's service area that terminate over AT&T's network. This Order describes these cards as CBT "joint use" cards. CBT also generates and maintains in the data base Personal Identification Numbers (PINs), used by the card-holder to prevent unauthorized use of the card. CBT updates the data base by adding or removing account numbers based on data available to CBT regarding the status of the customer account to which the RAO or line-based number is assigned.[2] This Order describes these data (the telephone line or RAO-based account number, the PIN, and the updated inclusion or exclusion of those numbers) as "validation data" or "validation information." CBT updates its database on a regular basis and provides AT&T with access to this information so that AT&T can validate an end user's use of these calling cards. *See Investigation Order*, 5 FCC Rcd 805, 808 (1990).

II. BACKGROUND

3. Cincinnati Bell Telephone filed Transmittal No. 518 on March 17, 1989, to implement presubscription and preselection for its public and semi-public pay telephones. Tariff provisions to implement this process were originally scheduled to become effective on June 15, 1989. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively to suspend and investigate Transmittal 518 on April 4, 1989, arguing that because CBT provides AT&T with access to validation data that CBT does not make available to other interexchange carriers (IXCs), the balloting procedures described in Transmittal 518 would result in highly biased selections by payphone premises owners which would only help perpetuate AT&T's existing payphone monopoly.

4. On June 14, 1989, the Common Carrier Bureau suspended this transmittal for five months and instituted an investigation of its lawfulness. On July 19, 1989, in the Order designating issues for investigation, the Bureau concluded that the CBT decision to conduct payphone presubscription balloting without making validation data available to all IXCs who choose to participate in the balloting presented substantial questions of lawfulness. Accordingly, the Bureau designated issues to determine the efficacy of CBT's presubscription process, and, more broadly, whether CBT possessed data which must be made available to other IXCs.

5. CBT's responses to the issues designated for investigation demonstrated that CBT provided two categories of validation data to AT&T: (1) a 14-digit number which is comprised of a 10-digit telephone line or RAO-based number and a 4-digit PIN; and (2) CBT's public payphone numbers and the telephone numbers of CBT customers who will not accept third party charged calls. These latter numbers are used for screening purposes and, CBT alleged, were available to interexchange carriers from other sources, such as US West Service Link. CBT also maintained, however, that the combination of the line or RAO-based number and PIN was proprietary to AT&T and could not be released to others.

6. In the *Investigation Order* released January 25, 1990, this Commission concluded that CBT's calling card practices were unreasonably discriminatory and undermined the presubscription plan in Transmittal 518. *Investigation Order*, 5 FCC Rcd at 805. Specifically, we found that CBT's role in the issuance and validation of calling cards that incorporate the customer's telephone number encompasses activities that are a byproduct of CBT's local exchange operations and, as such, was a Title II service which must be offered to all other interexchange carriers which could utilize such services. We then concluded that CBT's failure to do so violated Section 202(a) of the Act. We also determined that it would be unreasonable for CBT to conduct payphone presubscription balloting before restructuring its credit card related services to achieve compliance with Section 202(a), and therefore concluded that the payphone presubscription process described in Transmittal 518 was an unreasonable practice for purposes of Section 201(b) of the Act. For these reasons, we found Transmittal 518 to be unlawful and ordered CBT to cease and desist initiation of the balloting plan described in the transmittal. *Id.* at 808-09.

7. We also noted that the record did not contain sufficient data to determine "the exact nature of CBT's activities and obligations with respect to the 14-digit RAO numbers and the 4-digit PIN." 5 FCC Rcd at 809. Consequently, we stated that it was impossible to establish a definitive list of the services and data that CBT must offer to all IXCs on a nondiscriminatory basis. We therefore directed CBT, and invited other parties to the investigation, to "explain why CBT's role in the development and

use of the 14-digit RAO number and/or the 4-digit PIN is or is not a Title II activity that is subject to the Section 202(a) requirement that CBT not discriminate unreasonably between AT&T and the IXCs." 5 FCC Rcd at 809. The cycle for this round of pleadings ended on April 6, 1990.

III. SUPPLEMENTAL BRIEFS

8. In response to the *Investigation Order*, supplemental briefs and comments were filed by CBT, AT&T, Sprint, MCI Telecommunications Corporation (MCI), International Telecharge, Inc. (ITI), Nycom Information Services (Nycom), Capital Network Systems, Inc. (CNS), Allnet Communication Service, Inc. (Allnet), the Ameritech Operating Companies (Ameritech), the United States Telephone Association (USTA) [3] and The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company d/b/a US West Communications (US West). Joint comments were filed by the Competitive Telecommunications Association, the Operator Service Providers of America, National Telephone Services, Inc., the Operator Assistance Network, and Integretel, Inc. (Joint Commenters). A reply was filed by CBT.

9. CBT states that furnishing a customer's RAO number (or line number) is a Title II service because RAO numbers, which are assigned by Bell Communications Research, Inc. (Bellcore), are presently only available to local exchange carriers (LECs).[4] CBT Supplemental Brief at 6-7, 9. CBT argues, however, that generation of a 4-digit PIN is not a Title II activity because any number of data processing organizations could create random 4-digit PINs, assign them to CBT-furnished line or RAO-based numbers to create an IXC credit card number, and load these numbers into an IXC or contractor-maintained database for billing validation purposes. *Id.* Similarly, CBT contends that all services other than furnishing line and RAO numbers could be performed by CBT, service bureaus, other contractors, or by IXCs themselves without any dependence on local exchange operations. Therefore, CBT maintains, such services are not common carrier activities subject to Title II regulation. *Id.* at 8. Specifically, these services are taking the order for the card, PIN generation, assignment of the 14-digit account number to the customer, uploading the 14-digit account number to the IXC for card generation and internal records, and uploading the account number to the IXC's database. *Id.* at 6, 9.

10. AT&T's supplemental brief does not address the issue of whether furnishing RAO or PIN numbers is a Title II service. Rather, AT&T maintains the position it has taken throughout this proceeding -- that the numbers in question are the property of AT&T and, as such, need not be provided to any other IXC. Specifically, AT&T states that "the most the nondiscrimination provisions of Title II legitimately could require is that each local exchange carrier make functionally equivalent arrangements available to any interexchange carrier that wishes to obtain them, upon nondiscriminatory terms and conditions." AT&T Supplemental Brief at 3. AT&T reiterates that it has authorized CBT to make line-based calling cards available for use or issuance by any other IXC, but maintains that requiring that AT&T make existing RAO-based cards available to its competitors would be an "unwarranted and anticompetitive expropriation of AT&T's assets and investments." *Id.* at 4.

11. Except for USTA, US West, (which do not address the primary issue under investigation[5]) and Ameritech, all remaining parties agree that, at minimum, generating line or RAO-based numbers and 4-digit PINs is a Title II common carrier activity. *See, e.g.*, MCI Supplemental Comments at 8; ITI Supplemental Brief at 4-6; Joint Commenters Supplemental Brief at 10-12. Many, in fact, contend that all of the services engaged in by CBT in connection with these calling cards fall within the purview of Title II. *See, e.g.*, Nycom Supplemental Brief at 14-17; CNS Supplemental Brief at 8-9; Allnet Supplemental Comments at 2; Joint Commenters Supplemental Brief at iii.

12. Sprint, for example, states that because Sections 3(a) and (h) of the Communications Act, 47 U.S.C. §§ 153(a), 153(h), taken in conjunction define common carriage wire communication to include "instrumentalities" and services incidental to the transmission of telephone calls, and since calling card validation data are necessary in order to accept calling card calls, the provision of such data to AT&T is a "service" incidental to the transmission of telephone calls. Sprint Supplemental Brief at 2-3. Further, MCI asserts that because the calling cards in question are issued through a closely integrated system which is designed to ensure that the LECs can validate AT&T's calling cards for local telephone calls, all of CBT's calling card services (creating 14-digit card numbers, entering them into DBAS,[6] and forwarding them to BVA) are a byproduct of its status as a LEC, and as such, Title II functions. MCI Supplemental Comments at 6-8.

13. MCI, ITI, Allnet, and the Joint Commenters contend that because CBT has access to and is able to generate line or RAO-based numbers and PINs (and match the same with the name and address of the billed party) only in its capacity as a local exchange carrier, CBT's activities in this regard are Title II common carrier services. *See, e.g.*, ITI Supplemental Brief at 6; Allnet Supplemental Comments at 3; Joint Commenters Supplemental Brief at 11. Therefore, the Joint Commenters contend that the provision of validation information, all calling cards (both line number and RAO-based), billed number screening information and the billing name and address (which enables IXCs or their agents to match calling card numbers to the proper party for billing purposes) are exclusive LEC activities which derive from monopoly control of the local exchange.[7] Joint Commenters Supplemental Brief at iii.

14. Sprint maintains that whether the calling card number is line or RAO-based is irrelevant to determining the scope of CBT's common carrier activities, because both the line and the RAO numbers (including the PIN) are used to identify the calling party, and thus complete and validate a telephone call. Sprint Supplemental Brief at 5-6. Similarly, ITI argues that for purposes of determining the statutory obligations of a carrier issuing calling cards, the 14-digit number cannot meaningfully be separated into components to justify the conclusion that only a certain portion of the card issuing process is subject to regulation. According to ITI, this is because the line or RAO-based number is useless as a calling card number without the PIN, and the PIN is of no value without the preceding digits. ITI Supplemental Brief at 6. Likewise, the Joint Commenters view the PIN as an inseparable

aspect of the LEC's credit card-related local exchange service. The Joint Commenters contend that only one PIN may be assigned to any given line number at any particular time. Therefore, they contend, there is no means for proprietary cards to be issued on the same line number by competing IXCs distinguished solely on the basis of the PIN. Moreover, the Joint Commenters argue, the inclusion of the PIN in no way changes the common carrier nature of telephone number assignment because it is merely a security device added to the line number to prevent fraud. Joint Commenters Supplemental Brief at 11.

15. Thus, with the exception of CBT, AT&T, and Ameritech,[8] the parties argue that it is discriminatory for CBT to provide validation data to AT&T and not to provide such data to other IXCs, and request that this Commission direct CBT either to make the same validation data available to all IXCs or to cease furnishing the data to AT&T. *See* Sprint Supplemental Brief at 11. ITI requests that we require CBT to give all IXCs access to the calling card numbers that CBT has issued to date and the data needed to validate those cards. According to ITI, only this solution will satisfy CBT's statutory obligations and put all carriers on an equal footing with AT&T. ITI Supplemental Brief at 9. In addition to requesting that the Commission order CBT to provide all validation data stored in its database to all IXCs on equal and nondiscriminatory terms immediately, the Joint Commenters request that CBT be directed to ensure that all IXCs receive billing name and address information at the same rates and terms, and on the same conditions, including making the same options available to all. Joint Commenters Supplemental Brief at 15-16.

16. ITI contends that even if this Commission finds that some of CBT's calling card activities are not subject to Title II regulation, we should nonetheless exercise our jurisdiction to require universal use of calling cards. In support of this position, ITI asserts that in the Commission's Order which detariffed billing and collection services, the Commission stated that "a conclusion that a particular activity is not a common carrier communication service for purposes of Title II does not automatically compel the conclusion that we should terminate existing regulation of that activity or refrain from imposing other forms of regulation. We could invoke our ancillary jurisdiction under Title I of the Communications Act for that purpose."[9] ITI concludes that the instant circumstances present an appropriate opportunity for such action. ITI Supplemental Brief at 11.

IV. DISCUSSION

A. Access to Account Data

17. In the *Investigation Order*, we stated that CBT's role in the issuance and validation of the credit cards that AT&T uses encompasses some activities that are subject to Title II of the Communications Act, *e.g.*, CBT's generation of calling cards that incorporate the customer's telephone number (line-based cards). *Investigation Order*, 5 FCC Rcd at 808. We also concluded that additional information and analysis from the parties was required before we could determine the exact nature of CBT's activities and obligations with respect to the RAO-based numbers and 4-digit PINs. In this Order, we address whether CBT's activities with respect to its RAO-based numbers and 4-digit PINs are subject to Title II and we determine CBT's obligations under Title II with respect to all validation data.

18. Currently, in CBT's service area 100 percent of the interstate calls made on CBT payphones by cardholders using their RAO or line number-based calling cards are routed to AT&T. CBT admits that in order for IXCs other than AT&T to validate such a call, IXCs must obtain access to the database that lists current valid 10-digit line or RAO-based numbers and the 4-digit PINs. CBT Direct Case at 6, 16. The record in this proceeding indicates that these data can be generated only by CBT, that IXCs must obtain these data from CBT, and that (pursuant to CBT's practices) these data are not available to IXCs other than AT&T. Consequently, as a practical matter, no IXC other than AT&T is able to handle interstate calls made on CBT payphones using CBT joint use cards, which virtually eliminates any incentive for an IXC other than AT&T to be selected as the primary interexchange carrier (PIC) by a payphone premises owner in CBT's service area. Against this backdrop, we must consider whether CBT's refusal to provide to IXCs other than AT&T the same access to the CBT calling card database that CBT provides to AT&T is proscribed by the Communications Act. For the reasons discussed below, we conclude that CBT's provision of access to validation data, whether for line or RAO-number based cards, is an integral part of CBT's provision of exchange access and is therefore subject to the requirements of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

19. As previously noted, CBT readily concedes that furnishing 10 digit line and RAO numbers to customers is subject to Title II, and that the generation of these data is, in fact, an exclusive function of local exchange operations. CBT Supplemental Brief at 6, 8. In concluding in the *Investigation Order* that CBT's activities in generating and validating line-based calling cards were subject to Title II, we examined, *inter alia*, the process by which CBT receives orders from, and furnishes telephone line-based numbers to, CBT and AT&T customers for joint use calling cards. The record before us in this phase of our proceeding indicates that there is no appreciable difference in the manner by which telephone line and RAO-based calling card validation data are ordered, processed, generated, or maintained. In both cases, Bellcore, as administrator of the North American Numbering plan, supplies the first three digits -- the area code in the case of line-based numbers and the revenue accounting office code in the case of RAO-based numbers -- only to LECs. CBT then supplies the next seven digits and, through CBT Information Systems, furnishes the 4-digit PIN. Telephone line and RAO-based numbers undergo the same processes once generated -- all are maintained and updated by CBT in its DBAS and all are transferred in bulk to AT&T's BVA.[10] CBT obtains the information regarding the status of the customer's account, upon which it bases its decision to add or delete card numbers from the database,[11] in the ordinary course of providing local exchange service. Thus, CBT's activities for the provision and administration of RAO-based account numbers, including the PIN, are virtually identical to the methods employed in the generation of telephone line-based account numbers previously found to be subject to Title II, and therefore do not warrant distinguishing between the two.

20. We conclude that CBT's generation of validation data for its joint use cards is an integral part of its provision of exchange access. Access to this information is a necessary prerequisite for the placement of interstate calls when the customer relies on a CBT joint use card. As a practical matter, IXCs cannot handle such calls without access to the validation information because the IXC otherwise cannot be assured that the customer is an authorized user of a valid card. Because access to this validation information is an integral part of exchange access, CBT's activities with respect to providing this database access are subject to Title II. We find that CBT's provision of validation information to AT&T and not to other IXCs is unreasonably discriminatory and in violation of Section 202(a) of the Act.

21. Our conclusion here is not altered by CBT's argument that provision of the PIN, because other companies could generate it, is not subject to Title II. The PIN, which is known only to the authorized user(s), is an indispensable security device intended to prevent fraudulent use of the card. Without some means of ensuring that only authorized parties direct carriers to bill to their calling card accounts, validation would be impossible and the entire calling card system would be unusable by carriers and consumers. Therefore, the PIN is inseparable from the validation process and, thus, the completion of calls made with calling cards. Considered in this context, generation of the PIN in connection with CBT's joint use card is subject to Title II.

22. Nor are we persuaded by AT&T's argument, echoed by CBT, that the line and RAO-based validation information is proprietary to AT&T and is therefore exempt from the requirements of Title II. Both CBT and AT&T contend that line and RAO-based numbers and their PINs are generated pursuant to a billing and collection agreement between CBT and AT&T. Throughout this proceeding, AT&T has claimed to have a proprietary interest in these numbers sufficient to preclude their release to other IXCs. We reject this contention. First, AT&T has not substantiated its position apart from conclusory assertions that AT&T has proprietary rights. Because we have concluded that CBT has a Title II obligation to make line and RAO-based numbers and their PINs available to other carriers in addition to AT&T, a private agreement could not change those obligations or confer any proprietary rights on AT&T. Moreover, the line and RAO-based account numbers and associated PIN numbers are not generated by AT&T, are not maintained in a database by AT&T, cannot be updated by AT&T, and are not in fact used exclusively for AT&T credit card operations. In view of CBT's role in the generation and maintenance of updated validation information for these accounts, we conclude that AT&T cannot have a proprietary right in the data that would preclude CBT from making the numbers available to other IXCs as required by the Commission.

23. In sum, based on our review of the record, we conclude that CBT's generation and maintenance of, and provision of access to, validation information for its joint use calling cards are an integral part of CBT's provision of exchange access service and therefore are subject to the non-discrimination requirement of Title II. In light of this determination, we conclude that CBT's practices with respect to these calling card activities are inconsistent with the requirements of Title II. CBT's current practice of providing only to AT&T access to its data base for calling card validation information confers a significant competitive advantage upon AT&T in the interexchange market because CBT subscribers can use their cards to obtain services described as interLATA only from AT&T. Thus, CBT's practice violates Title II's prohibition in Section 202(a) against unreasonable discrimination and undue preferences. Therefore, CBT must comply with Title II of the Act in its provision of access to validation information by providing such access to all IXCs on a nondiscriminatory basis. Accordingly, we conclude that CBT must, at a minimum, provide access to its validation data that is sufficient to enable the IXC handling the call to validate the card use sought by the caller.[12]

B. CIID Conversion

24. The parties to this proceeding have indicated that CBT has been or will be converting some or all of its existing RAO and line-based account numbers to the Card Issuer Identification (CIID) account numbering format.[13] However, CBT's assignment of a CIID number to such accounts in no way changes the character of the information or CBT's Title II obligation to provide IXCs with access to that account information. Although it has been necessary for purposes of clarity to define the data at issue in this proceeding in terms of actual composition, *i.e* the 14 digit line or RAO-based number, the primary significance of the data does not lie in the sequence or number of digits that appear on the face of the calling card. Rather, the numbers' significance lies in their association with the account information necessary to inform an IXC that an authorized, credit worthy user seeks to place a call with a valid calling card. Therefore, the Title II obligations identified above apply equally to validation data for RAO or line-based cards that have been reclassified as CIID cards. Indeed, we understand that Bellcore specifications for the CIID format include the RAO-based account numbering scheme. In this instance, at least, "CIID" cards may have undergone no number change whatsoever.

25. The parties have not indicated, however, the nature or extent of CBT's role in the assignment of CIID numbers to new joint use calling card accounts. Nor have the parties provided information as to the means by which databases for such accounts are established and maintained. We propose to determine a carrier's Title II obligation with respect to such calling card accounts in the context of the Notice of Proposed Rule Making (NPRM) concerning LEC validation and billing information for joint use calling cards we adopt this day. *See* CC Docket No. 91-115, FCC 91-118, adopted April 9, 1991. Rather than continue this investigation to resolve this issue with respect to CBT in this proceeding, we will resolve that issue in the Rule Making proceeding.

C. Conclusion

26. Accordingly, with respect to CBT joint use calling cards cards which bear line or RAO-based account numbers supplied by CBT, which may be used for the services of CBT and AT&T, and which are validated via access to data maintained by CBT, we find that CBT is required to provide to all IXCs, in a manner consistent with Title II, the same non-discriminatory access to validation data that CBT currently provides to AT&T, irrespective of the conversion of any of those account numbers to the CIID format or any other numbering scheme.[14]

V. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that, Cincinnati Bell Telephone Company shall provide to all interexchange carriers on a non-discriminatory basis, the data and services described in paragraphs 2 and 19 above.

28. IT IS FURTHER ORDERED that on or before June 24, 1991, Cincinnati Bell Telephone Company shall file a report describing the steps it has taken to achieve compliance with this Order.

29. IT IS FURTHER ORDERED that CC Docket No. 89-323, Investigation of Cincinnati Bell Telephone Company's calling card practices is HEREBY TERMINATED.

30. IT IS FURTHER ORDERED that US West's request to accept its reply comments is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* Cincinnati Bell Telephone Company, Transmittal No. 518, 4 FCC Rcd 5033 (Com.Car.Bur. 1989) (*Suspension Order*); Cincinnati Bell Telephone Company, Transmittal No. 518, CC Docket No. 89-323, 4 FCC Rcd 5735 (Com.Car.Bur. 1989) (*Designation Order*); 5 FCC Rcd 805 (1990) (*Investigation Order*).

[2] By account status, we mean all of the information regarding the customer's account which CBT gathers in the course of providing its local exchange service and which might cause CBT to include or remove an account from its database. This would include, for example, whether the account is associated with a working line or whether the account number has been retired or reassigned to another customer.

[3] On March 19, 1990, USTA filed a petition for leave to file comments in this proceeding, having read the *Investigation Order* to authorize comments only from parties that had filed pleadings in earlier stages of the proceeding. We hereby grant USTA's petition and accept the referenced comments.

[4] CBT also states that furnishing 10-digit line and RAO numbers is dependent upon LEC operations. CBT Supplemental Brief at 8.

[5] USTA's chief concern was that the Commission avoid taking action which might conflict with requirements for BOC calling cards under the MFJ. USTA therefore asked the Commission not to take action in this proceeding and permit Transmittal 518 to take effect on an interim basis. US West filed comments in order to address what it termed a "factual error" in the record concerning its compliance with an Order issued by the MFJ court. Both asked the Commission to avoid making general policy statements concerning calling card obligations in the context of the instant tariff investigation.

[6] The DBAS, or Data Base Administration System, is owned, operated, and maintained by CBT, and reflects data regarding the status of the customer account which is gathered by CBT in the course of providing local telephone service. On a nightly basis, CBT sends this information over dedicated lines to the Billing Validation Application (BVA), a database owned, operated, and maintained by AT&T. AT&T consults this database via its signalling network to validate credit cards issued by CBT. *See Investigation Order*, 5 FCC Rcd 805, 808 (1990).

[7] MCI also asserts that calling card numbers function as a form of automatic number identification (ANI) for switched access 0+ and 0-calls, which is "unquestionably" a common carrier function under Title II. MCI Supplemental Brief at i.

[8] The pleadings filed by USTA and US West are silent on this issue.

[9] ITI Supplemental Brief at 10-11, *citing Detariffing of Billing and Collection Services*, 102 FCC 2d 1150, 1169 (1986). *But cf.* Supplemental Comments of Ameritech at 3, 4.

[10] *See* note 6, *supra*.

[11] *See* note 2, *supra*.

[12] Such access could take the form of providing on a call-by-call basis a simple "deny/no deny" signal from the DBAS, akin to that currently provided by the Bell Operating Companies for validation of the joint use cards they issue, indicating whether the card number and PIN provided by the caller appear in the data base of valid account numbers.

[13] Cards issued pursuant to the CIID format bear 14 digits, the first six of which comprise a code identifying the carrier issuing the card.

[14] By letter dated May 24, 1990, CBT presented a proposal which it claimed would resolve the issues raised in this investigation. By its terms, however, this proposal was conditioned on the approval of AT&T. By letter dated March 28, 1991, CBT submitted a letter dated March 19, 1991 from AT&T which did not mention CBT's May 24 proposal, but which also purported to present a solution to the issues we address herein. Further information and explanation is needed however, to determine whether either of these proposals could succeed as remedies. As a Rule Making proceeding is a more appropriate forum for examination, discussion, and resolution of solutions of the kind presented in these proposals, we will consider these and other proposals in the context of the Rule Making initiated by the Commission on April 9, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-115

In the Matter of

Policies and Rules Concerning
Local Exchange Carrier Validation
and Billing Information for Joint
Use Calling Cards

NOTICE OF PROPOSED RULE MAKING

Adopted: April 9, 1991; Released: May 24, 1991

Comment Date: June 24, 1991
Reply Comment Date: July 15, 1991

By the Commission:

I. INTRODUCTION

1. By this Notice, this Commission proposes rules which would clearly establish the obligation of local exchange carriers (LECs) under Title II of the Communications Act to provide to all interexchange carriers (IXCs) access to certain information and services for both LEC and IXC joint use calling cards.[1] We seek comment on these access requirements, on feasible methods of implementation, and on the rate structures we should permit or require.

2. Following receipt and consideration of the comments filed in this docket, we expect to promulgate general rules governing LEC calling card validation services. We recognize that suitable methods of compliance with these rules may be influenced by the variety of network configurations currently in existence as well as the rapid changes in industry practice and technology. Therefore, one of our objectives in this docket is to obtain current and complete information on the technology and network configurations underlying the provision of calling card services.

II. BACKGROUND

3. The Commission has received various requests that it require LECs to provide IXCs with access to LEC card validation data and billing and collection services. These requests were reflected in the US Sprint petition that led to the investigation in CC Docket 89-323 of Cincinnati Bell Telephone Company (CBT) Transmittal No. 518, and in a petition to mandate billing and collection services and access to validation data, or alternatively, petition for Rule Making filed by Capital Network Systems, Inc. (CNS) and the Competitive Telecommunications Association (CompTel). These petitioners maintain that, unlike the American Telephone and Telegraph Company (AT&T), certain IXCs are unable to accept calling card calls because they are denied access to LEC validation information and billing and collection services vital to the completion of such calls, thereby depriving them of revenues, and subjecting them to a significant competitive disadvantage vis-a-vis AT&T. In Docket 89-323, the Commission issued four Orders resolving many of these issues with respect to CBT. The most recent Order establishes specific requirements for IXC access to CBT validation data associated with CBT's joint use calling cards.[2] The record in the CBT proceeding provided only limited information about the specific calling card practices of all LECs. Therefore, we are initiating this proceeding to determine the requirements which should be established for all LECs.

4. Accordingly, we propose to adopt regulations which would require all LECs to provide to all IXCs nondiscriminatory access to validation and billing information and services associated with LEC joint use calling cards. We also propose to adopt regulations governing the services and information that LECs must provide to IXCs for IXC joint use cards.

A. Credit Card Calling

5. When an end user attempts to place a call with a calling card, the carrier operating the network over which the call will be transported, receiving no advance compensation, undertakes to verify that the card number presented is valid, *i.e.*, that the number reflects an authorized user and an account which can be billed. In order to accomplish this, the carrier must access the database of the card issuer. Unless the card issuer provides access to the relevant information in its database, the carrier seeking to transport the call will have no way of knowing whether the calling card account number is valid. Furthermore, the carriers may not even know the customer's name and address. Without access to the billing name and address associated with the calling card account, which information is obtained and maintained by the LEC, completion of calling card calls in this circumstance increases the risk of non-collection for invalid account numbers.

6. Due to the pre-divestiture relationship between AT&T, the Regional Bell Operating Companies (BOCs) and most independent LECs, a shared database was in operation which contained validation information -- presumably, at a minimum, the calling card account number and customer billing name and address. A system of shared calling cards developed as a natural outgrowth of the pre-divestiture partnership arrangements. Following divestiture, this credit card arrangement continued under the AT&T Plan of Reorganization despite a split in ownership of the hardware. IXCs other than AT&T, however, were not permitted access to these data. Pursuant to a court Order interpreting Modified Final Judgment requirements, [3] the BOCs must provide to all IXCs access to data sufficient to validate BOC calling cards.

B. CBT Investigation

7. The CBT investigation, which was initiated by the Common Carrier Bureau in June, 1989, is the forerunner and companion of this Notice. The record and findings in that investigation establish the basis for the rules proposed herein.

8. The investigation of CBT's calling card practices began with CBT's March 17, 1989 filing of Transmittal No. 518 to implement presubscription and preselection for CBT's public and semi-public pay telephones. On April 4, 1989, US Sprint Communications Company

Limited Partnership (Sprint) petitioned this Commission to reject, or alternatively, suspend and investigate Transmittal 518 on the ground that, because CBT furnishes AT&T with validation data for calling cards that CBT does not make available to other IXCs, the presubscription balloting procedures described in Transmittal 518 would result in decidedly biased selections by payphone premises owners which would perpetuate what Sprint characterized as AT&T's monopoly in the payphone market.

9. Transmittal 518 was suspended on June 14, 1989 by the Common Carrier Bureau; issues were designated for investigation in an Order released July 19, 1989. The record in that investigation disclosed that CBT provides AT&T with access to a continuously updated list of the following information: the 14-digit calling card account numbers for CBT's joint use cards, comprised of a 10-digit telephone line or Revenue Accounting Office (RAO) based number and a 4-digit Personal Identification Number (PIN); and screening data, including toll billing exception,[4] for CBT's service area. CBT alleged that screening data were available to IXCs from other sources, such as US West Service Link. CBT also maintained, however, that the combination of the line or RAO-based number and PIN was proprietary to AT&T and could not be released to others.

10. The CBT investigation disclosed that, in general, when a CBT local exchange service subscriber places an order with CBT for a calling card, that subscriber will provide, at CBT's request, basic customer information, *e.g.*, name, billing address, etc., which will then be loaded by CBT into its Customer Records Information System (CRIS). Historically, Bell Communications Research (Bellcore), as administrator of the North American Numbering plan, has supplied to all LECs the first three digits of the calling card account number to be associated with this customer information -- the area code, in the case of a line-based number, and the revenue accounting office code, in the case of an RAO-based number. CBT then supplies the next seven digits and, through CBT Information Systems, furnishes the 4-digit PIN. The calling card account number is then uploaded into CBT's Data Base Administration System (DBAS), a database that is owned, operated and maintained by CBT and located on its premises.[5] This database is updated on a nightly basis by CBT to reflect the relative status of each account.[6] According to CBT, a "mirror image" of the information contained in the DBAS is then transferred to magnetic tape for shipment to one of AT&T's Billing Validation Application (BVA) databases. The BVA, which is owned, operated and maintained by AT&T, stores the data that has been updated and transferred by CBT. More importantly, the BVA is the database which is queried by AT&T to determine if a calling card account number is valid. An inquiry as to the validity of a calling card account number is routed through AT&T's Common Channel Signalling (CCS) network by AT&T switches to the appropriate BVA according to the numbering sequence of the calling card account. After comparing the inquiry with the information contained in the BVA, the BVA sends a signal indicating whether the calling card number matches the number loaded by CBT's DBAS, or in other words, is "valid". *See, e.g., Investigation Order* at 808; *Final Order* at paragraph 2.

11. In the CBT investigation, this Commission found CBT's generation and maintenance of, and provision of access to, updated validation data for joint use calling cards to be an integral part of CBT's provision of exchange access and subject to Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). In support of this conclusion, we stated that, as a practical matter, such calls could not be placed or completed without CBT's services and without access to the validation data described in the preceding paragraph. Therefore, we found these data and services to be the "necessary prerequisite for the placement of interstate calls when the customer relies on a CBT joint use card. *Final Order*, at paras. 20-23.

12. On this basis, we concluded that CBT's practice of providing only AT&T with access to its data base for calling card account information conferred a significant competitive advantage upon AT&T in the interexchange market and violated the Section 202(a) prohibition against unreasonable discrimination and undue preferences. We also determined that because the line and RAO-based numbers and their PINs are not generated by AT&T, are not maintained in a database by AT&T, cannot be updated by AT&T, and are not used exclusively for AT&T credit card operations, AT&T cannot have a proprietary right in these account numbers sufficient to prohibit CBT from making these data available to other IXCs as required by the Commission. *Final Order* at paragraph 22. Accordingly, with respect to CBT joint use calling cards, *i.e.*, cards which bear line or RAO-based account numbers supplied by CBT, which may be used for the services of CBT and AT&T, and which are validated via access to data maintained by CBT, we directed CBT to provide to all IXCs the same non-discriminatory access to validation data that CBT currently provides to AT&T.[7]

C. CompTel/CNS Petition

13. On June 1, 1989, CNS and CompTel filed a petition with this Commission requesting that the Commission adopt a policy requiring all LECs which provide billing and collection service to any IXC, including those which provide operator-assisted services, to make available to all other IXCs billing and collection services, for a just and reasonable charge. Additionally, these petitioners request that the Commission adopt a policy statement requiring all LECs to make available to IXCs the data necessary to validate calls charged to calling cards, third party-billed telephone numbers and collect calls. CompTel/CNS Petition at 1-2. CompTel and CNS request that the Commission ensure that the services are available on just, reasonable and nondiscriminatory terms. *Id.* at 34. To the extent that the relief requested requires that the Commission promulgate rules, CNS and CompTel in the alternative, request that the Commission commence a Rule Making proceeding proposing rules mandating LEC provision of billing and collection services and access to validation data. *Id.* at 2.

14. CompTel and CNS maintain that LEC-provided billing and collection is necessary for the provision of competitive operator assisted services. In this regard, they state that when LEC calling cards are used to charge calls, the calls are billed by the card-issuing LEC and appear on the end user's LEC-issued telephone bill. Unlike direct dialed or 1+ service, these parties assert, in operator assisted or 0+ service, the carrier has no relationship with the end user. The subscriber to the service is the premises owner; the end user is usually a transient guest of the telephone location served by the IXC offering operator assisted calling. *Id.* at 14. The absence of this carrier-subscriber relationship, CNS and CompTel con-

tend, makes it impossible for an IXC to have an end user's calling card calls billed and collected except through a credit card service available to the IXC. *Id.* at 15-16. Consequently, CNS and CompTel maintain, for an end user who charges a call to a credit card, operator services providers (OSPs) or IXCs can collect their charges only if the calls are billed by the issuer of the card. CNS and CompTel assert that for many consumers who either cannot afford or who do not wish to incur the additional costs associated with commercial credit cards, the LEC is the only means for charging operator assisted calls. *Id.* at 16 n.23. Therefore, CNS and CompTel contend, for LEC issued calling cards, there is no practical alternative for LEC billing and collection. CNS and CompTel thus conclude that for billing and collection for operator-assisted calls charged to LEC calling cards, LEC provided billing and collection remains a monopoly service. *Id* at 15-16.

15. CNS and CompTel also assert that this Commission should require all LECs to provide IXCs with access to the data necessary to validate calls charged to LEC calling cards and to third party-billed telephone numbers. The petitioners maintain that, without such access, IXCs are powerless to prevent fraudulent use of such calling cards, third party-billed numbers, and other numbers which restrict charges for collect calls. The petitioners request that the Commission mandate that all LECs provide access to validation data on terms that are just and reasonable and not unreasonably discriminatory.

D. Line Information Data Base

16. In order to implement certain requirements of the Modified Final Judgment in the AT&T divestiture proceeding,[8] the Bell Operating Companies (BOCs) are implementing a calling card validation data base they have named the Line Information Data Base or LIDB. LIDB is an interconnected series of databases, maintained by individual BOCs, each of which contains the credit card numbers and PINs for calling cards issued by the BOCs to their subscribers.

17. The BOCs will permit all IXCs to access LIDB on a call-by-call basis in order to validate an end user's use of a BOC card for an IXC's services. In addition, the BOCs will access LIDB to validate the use of BOC cards for intraLATA[9] services. Thus, the IXCs will be able to accept BOC cards for the IXCs' services and the BOCs will be able to accept each other's cards for their intraLATA services.

E. CBT Proposal

18. On May 24, 1990, in the context of the CBT investigation, CBT notified the Commission by letter (CBT Letter) that it would be willing to enter into the same type of arrangements with AT&T as those outlined in Section V of the court opinion in United States v. Western Electric Company, Civil Action No. 82-0192, May 8, 1990 (*May 8 Opinion*). [10] Specifically, CBT states that it intends to participate in the Card Issuer Identification (CIID) format plan[11] and, provided AT&T will agree, will load what it refers to as "AT&T-only" card numbers in CIID format into CBT's Line Information Data Base (LIDB). CBT Letter at 2. CBT asserts that this proposal will resolve all the issues raised in the CBT investigation because it will provide Sprint and other IXCs with a means to validate calls placed over their networks using AT&T-only cards. *Id.* at 1.

19. AT&T did not mention CBT's proposal in the Supplemental Brief it filed in the CBT investigation. However, by letter dated March 28, 1991, counsel for CBT provided the Commission with a copy of a letter dated March 19, 1991, from Mr. G.A. Hines, Director, AT&T Card/Operator Services (AT&T Letter). The AT&T letter authorizes CBT to load "all AT&T-only cards issued in non-proprietary format into [LIDBs] used by [CBT] or into databases maintained by third parties." AT&T Letter at 1. According to AT&T, this authorization pertains to: 1) all telephone line-based cards using Cincinnati Bell Telephone Company line numbers; and 2) any RAO-based AT&T cards beginning with the numbers 677150 through 677159, and 677170 through 677179.

20. Acceptance of either CBT's or AT&T's offer as dispositive of the CBT investigation would have required the assumption of several critical facts not in the CBT record or otherwise before this Commission. For instance, by its terms, CBT's proposal is conditional upon AT&T's willingness to convert certain card numbers into CIID format and to permit CBT to load those numbers into CBT's LIDB. As stated, AT&T's offer, which does not reference or otherwise incorporate CBT's proposal, does not address CIID conversion. Second, CBT's willingness to load "AT&T-only" cards needs further clarification since CBT does not define this term. It is not clear whether the "AT&T-only" cards CBT offers to load into LIDB are the same as the "AT&T-only" cards issued in "*non*-proprietary" format AT&T offers to release. Furthermore, AT&T's willingness to permit CBT to load into LIDB the discrete account numbers specified in its offer may or may not cure the problem at issue depending upon whether the numbers included in AT&T's offer encompasses all of the data we required CBT to provide access to in the *Final Order*, *viz.*, *all* RAO and line numbers and corresponding PINs for CBT joint use cards. Finally, more information concerning the degree to which LIDB is in place is needed in order to evaluate either proposal. For these reasons, we did not address these proposals in the CBT investigation. Rather, we herein invite comment on the extent to which the above proposals would satisfy the requirements discussed *infra*.

III. PROPOSED REQUIREMENTS

21. In light of the CompTel-CNS petition and the record and findings in the CBT proceeding, we propose to clearly establish for all local exchange carriers the Title II obligations discussed in the CBT *Final Order*. We propose to require that all LECs issuing joint use calling cards provide access to the validation data associated with such cards, regardless of the numbering format, to all IXCs transmitting a call from an end-user seeking to use such a card. We also propose to require LECs to provide both screening data and the billing name and address (BNA) for LEC joint use cards so as to make available to IXCs the full component of validation data, and to enable IXCs to independently seek reimbursement from the cardholder for the services sought by the caller. Like validation data, BNA is obtained by LECs in the provision of local exchange service and appears to be uniquely in the possession of the LEC. This data enables IXCs to bill and collect for their services from transient locations. BNA for LEC joint use calling cards, like the calling card validation services, is an integral part of exchange access.

22. Some IXCs choose to issue their own calling cards and maintain the account information for those cards. Such cards can be used for both the IXC's services and a LEC's services only if the LEC agrees to access the IXC's database to validate the card when an end user presents the card to obtain the LEC's services. We tentatively conclude that a LEC entering into such an agreement must do so on a non-discriminatory basis. Accordingly, we propose to require that, if a LEC enters into a joint use arrangement with an IXC for the IXC's card, *i.e.*, the LEC agrees to permit end users to use the IXC card for the LEC's services, the LEC must provide such joint use arrangements to all IXCs on a non-discriminatory basis. We seek comment on this requirement.

23. Thus, we are granting the petition filed by CompTel-CNS insofar as it requests that this Commission initiate a Rule Making requiring LECs to make available the data necessary to validate calling card calls. Based on the information adduced during the CBT investigation, we propose to establish this access requirement in the case of LEC joint use cards.

24. We deny, however, the CompTel-CNS petition to the extent that it requests that this Commission mandate that LECs provide billing and collection services to IXCs. To grant this aspect of the CompTel-CNS petition would be tantamount to a reconsideration of *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150, *recon. denied*, 1 FCC Rcd 445 (1986) (*Detariffing Order*), which we decline to do at this time. CNS and CompTel argued that their request would not require such reconsideration because the Commission's rationale for detariffing these services does not apply to billing and collection for operator services. Specifically, CNS and CompTel maintain that at the time the *Detariffing Order* was released, the Commission was focusing only on the direct dialed or 1+ market because no IXC other than AT&T offered any operator-assisted services. CNS-CompTel petition at 11-13. Although we recognize that operator services have proliferated since the release of that Order, we note here that the basis for our decision to detariff billing and collection services was that we found that the billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act.[12] *Detariffing Order* at 1167-69.

25. In the *Detariffing Order*, we also acknowledged that we could invoke our ancillary jurisdiction under Title I of the Communications Act for purposes of regulating these services, but found that exercising such jurisdiction requires a record that such regulation would be directed at protecting or promoting a statutory purpose. Because the Commission found that sufficient competition existed in the billing and collection market, the Commission concluded that no statutory purpose would be served by continuing to regulate such services. *Id.* at at 1169-70. The petitioners' arguments regarding changes in the degree of competition for the provision of operator-assisted services do not demonstrate that billing and collection services are no longer subject to competitive pressures.[13]

26. We have recounted above the process by which CBT generates and administers calling cards. We also request that interested parties submit information describing how other LECs handle calling card operations.[14] We specifically seek comment on whether other LECs generate joint use cards on behalf of IXCs, whether they generate non-joint use cards on behalf of IXCs, and if so, the process by which this is accomplished. Similarities and differences from the manner in which CBT administers calling cards outlined in paragraph 10 above should be clearly delineated.

27. Industry briefings and information obtained in the CBT investigation brought to light the apparent existence of LEC joint use calling cards employing different numbering formats such as the Card Issuer Identification (CIID) format.[15] However, the CBT record contained no information concerning the effect that issuing LEC joint use cards in formats other than the subject line or RAO-based scheme would have on a LEC's Title II obligation to provide access to these data. As stated above, we herein propose to require access to billing and validation information and services for LEC joint use cards without regard to the numeric scheme of the calling card accounts. We expressly request commenting parties to identify the activities performed by a LEC when a calling card account is established in the CIID or other numbering format, including the maintenance of databases for such accounts.

28. We also request comment on the effectiveness of the proposed Line Information Data Base (LIDB) to solve the difficulties discussed in this Notice, as this database is reputed to have the capability to override the presubscribed line's carrier with the credit card owner's preference. Respondents in this proceeding should address the feasibility of LIDB interconnection, the progress achieved thus far, and the degree to which LIDB deployment will alleviate the problem of access to validation and billing information. We also request comment on the technical feasibility and cost of using LIDB to store and retrieve BNA data. We welcome information and comments on any alternative approaches to these problems.

29. In the course of the CBT investigation, the record reflected that access to LEC validation information, in those instances where it is provided, is handled differently depending upon the configuration of the carrier's network, the presence or absence of an SS7 or similar signalling network, and of course, the willingness of carriers to share databases. We welcome comment from affected carriers as to the technological implications of our proposed requirements and the feasibility of implementation. Specifically, parties should comment on the network facilities required to achieve the access proposed by this Notice, the relative cost thereof and whether additional facilities would be required for compliance.

30. We also seek comment on how best to make available access to the validation data at issue herein. For example, parties should discuss whether or not access should be provided on a call-by-call, bulk transfer or some other basis. Parties should include in their discussion whether such access is inconsistent with the policies underlying our customer proprietary network information (CPNI) requirements, which includes virtually all information about a customer's network services and use of those services that a LEC possesses by virtue of its provision of network services.[16] In the case of screening data, parties should discuss whether the transfer should occur quarterly, monthly, weekly, etc., and the variables supporting one method of delivery over another. We also invite parties to comment on whether we should expand the proposed requirement to include BNA for 0+ and 10XXX calls that are placed without the use of a LEC joint use card. Comments addressing this requirement should likewise include a discussion of the policies underlying our CPNI requirements, as indicated above.

31. Because of the sensitive nature of BNA, and the variety of possible ways in which access to this data could be provided, we request commenting parties to file pleadings addressing (1) whether LECs should be required to disclose the BNA data for its joint use cards to any IXC handling a call billed to such a card; (2) if so, the means by which such a disclosure should be accomplished; and (3) the limits, if any, on the disclosure procedures given the general policies concerning CPNI.

32. Finally, parties should address the appropriate rate structure or other tariff requirements we should impose on the LECs' provision of access to validation and billing information.

IV. PAPERWORK REDUCTION ACT

33. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found not to impose new or modified information collection requirements on the public.

V. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS[17]

34. Reason for action: The Commission is issuing this Notice of Proposed Rule Making to announce our intent to establish regulations governing LEC provision of access to validation and billing information, and to specify, in as much detail as possible, the substance of these regulations.

35. Objectives: (1) to preclude discriminatory treatment of IXCs by LECs with regard to the provision of validation and billing information for joint use calling cards; (2) to obtain comment from LECs, the public, and other affected sectors of the industry, prior to establishing regulations in the above area.

36. Legal basis: Sections 4(i), 201-205 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201-205, 303(r).

37. Description, potential impact and number of small entities involved: The proposed regulations would be applicable to all LECs, of which there are approximately 1400. Since about 90 percent of LEC access lines belong to the eight largest LECs,[18] the vast number of LECs are small telephone companies. The proposed rules would require that these small companies provide to all IXCs, nondiscriminatory access to validation and billing information for joint use cards, if they provide these data and services to any IXC.

38. Reporting, recordkeeping and other compliance requirements: The proposed rules impose no reporting requirements and no new recordkeeping requirements. LECs would, however, have to file tariffs for the provision of the data and services.

39. Federal rules which overlap, duplicate or conflict with the Commission's proposal: None.

40. Any significant alternatives minimizing impact on small entities and consistent with stated objectives: This Notice of Proposed Rule Making proposes alternatives for the method of provision of access to validation and billing information, *e.g.*, giving LECs the option to provide such access on a call by call or bulk transfer basis, and specifically solicits suggestions for other alternatives from affected parties. This Notice also solicits general comments on the proposed rules. Therefore, ample opportunity for small entities or their advocates to voice their concerns is provided.

VI. EX PARTE REQUIREMENTS

41. For purposes of this non-restricted notice and comment rule making proceeding, interested parties and members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of the public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

42. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.202(b) of the Commission's Rules, 47 C.F.R. § 1.202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted, two copies of the same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

43. Any person making an oral *ex parte* presentation which presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in the proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

44. All relevant and timely comments and reply comments will be considered by the Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VII. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED that, pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 U.S.C. §§ 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before June 24, 1991. Reply comments SHALL BE FILED as indicated above on or before July 15, 1991. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W. Washington, D.C. 20554.

46. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this Notice of Proposed Rule Making to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981). The Secretary shall also cause a summary of this Notice of Proposed Rule Making to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] LEC joint use calling cards bear account numbers supplied by a LEC, are used for the services of the LEC and a designated IXC, and are validated by access to data maintained by the LEC. *See e.g.* Cincinnati Bell Telephone, CC Docket No. 89-323, FCC-91-117, paras. 2 and 26, adopted April 9, 1991, released May 24, 1991 (*Final Order*). IXC joint use cards bear account numbers supplied by an IXC, are used for the services of the IXC and a designated LEC, and are validated by access to data maintained by the IXC.

[2] Cincinnati Bell Telephone Company, Transmittal No. 518, 4 FCC Rcd 5033 (Com.Car.Bur. 1989) (*Suspension Order*); Cincinnati Bell Telephone Company, Transmittal No. 518, CC Docket No. 89-323, 4 FCC Rcd 5735 (Com.Car.Bur. 1989), (*Designation Order*); 5 FCC Rcd 805 (1990) (*Investigation Order*); and FCC 91-117, adopted April 9, 1991, released May 24, 1991 (*Final Order*).

[3] *U.S. v. Western Electric Company, Inc.*, 698 F.Supp. 348, 355 (D.D.C. 1988).

[4] Screening data consists of a LEC's public payphone numbers and the telephone numbers of its customers who will not accept third party charged calls (also referred to as Toll Billing Exception). The parties did not dispute CBT's contention that screening data could be obtained from other sources. Therefore, access to this information was not at issue in the CBT investigation.

[5] It is not clear from the current record whether the customer's billing name and address are included in the DBAS.

[6] For example, an account for which telephone service has been terminated at the customer's request or by CBT for credit or other reasons, would simply be removed from the DBAS by CBT. This account would also be deleted from AT&T's BVA during CBT's nightly update. Thus, when AT&T queries its BVA in search of the account number, and finds it missing, AT&T would declare the calling card account "invalid." *See Investigation Order* at 808; *Final Order* at paragraph 2.

[7] Our Order required such access regardless of whether CBT had converted its account numbers to the Card Issuer Identification (CIID) format or any other numbering scheme. *See* note 15, *infra*, and *Final Order*, paragraph 24-26.

[8] *See U.S. v. Western Electric Company, Inc.*, 698 F.Supp. 348, 355 (D.D.C. 1988).

[9] A LATA is a local access and transport area defined by the MFJ within which a BOC provides service.

[10] The United States District Court for the District of Columbia, which administers the decree in United States v. American Tel. and Tel. Co., 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983), ordered the Bell Operating Companies (BOCs) to submit plans for honoring all carriers' cards for intraLATA calls in October 1988. The CIID plan was one of three plans devised by the BOCs to allow them to honor all ICs' calling cards for intraLATA use. The Department of Justice determined that this plan was consistent with the Modification of Final Judgment (MFJ), and Judge Greene endorsed it, with changes, as an interim solution. *See May 8 Opinion* at 26.

[11] *See* note 15, *infra*.

[12] CNS and CompTel state that their proposal would not require that we retariff billing and collection services; that we could require that LECs enter into billing and collection contracts with IXCs and OSPs and then review the charges under these arrangements by means of the Section 208 complaint process to ensure that the charges are reasonable and nondiscriminatory. In effect, however, this would require the Commission to engage in the same kind of oversight of rates, charges, and services that we discontinued in the *Detariffing Order*.

[13] Our proposal herein to require LECs to provide BNA, if adopted, would enable the petitioners to perform billing and collection without interrupting 0+ calls to obtain the customer's BNA on a call-by-call basis. If we do not adopt this proposal, CNS and CompTel can renew their petition without prejudice.

[14] At least one party in the CBT investigation, specifically the United States Telephone Association (USTA) commented that "many other exchange carriers" do not engage in the same calling card arrangements with IXCs as CBT. USTA Comments in CC Docket No. 89-323, CBT Investigation, at 1, 5.

[15] The CIID numbering plan was developed by Bellcore in response to an MFJ Court requirement. CBT Supplemental Brief filed in CBT investigation, CC Docket No. 89-323 at 7, n.7. CIID cards bear 14 digits, the first six of which identify the carrier issuing the card. This identifying code enables a BOC's operator services system to direct validation queries to the card issuer's database and to send billing records to the correct entity. Ameritech asserts that all carriers that issue cards in this format will need to establish their own validation data bases or arrange with another data base provider for validation. Supplemental Comments filed by Ameritech in the CBT investigation, CC Docket No. 89-323, Attachment B at 3.

[16] In various contexts, the Commission has found that CPNI should receive special protection against nonconsensual disclosure. The Commission decided that authorization must be ob-

tained prior to the release of a customer's CPNI to other companies. *See* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 215 (1988); Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958, 1089 (1986); Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, 102 FCC 2d 655, 692 (1985). *See also* Computer III Remand Proceeding: Bell Operating Company Safeguards; and Tier I Local Exchange Company Safeguards, CC Docket No. 90-623, Notice of Proposed Rule Making and Order, 6 FCC Rcd 174, 180 (1991) (Requesting proposals for improving the implementation of, and for possible modifications to, the current CPNI rules applied to BOC provision of enhanced services.)

[17] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of the Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, the proposed regulations on small telephone companies.

[18] Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Corporation, New York Telephone Company and New England Telephone and Telegraph Company, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, Pacific Northwest Bell Telephone Company and General Telephone and Telegraph Company.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-155

In re Applications of

WINONA EAR LEASING ASSOCIATES INC (hereafter "Ear")	File No. BPH-900509ML
JAMES INGSTAD (hereafter "Ingstad")	File No. BPH-900514MD
HOME BROADCAST COMPANY (hereafter "Home")	File No. BPH-900514MG
WINONA RADIO COMPANY (hereafter "WRC")	File No. BPH-900514MJ
R and B PARTNERSHIP (hereafter "R and B")	File No. BPH-900514ML
MINNESOTA PUBLIC RADIO (hereafter "MPR")	File No. BPED-900514MA (HEREIN DISMISSED)

For Construction Permit
For a New FM Station on Channel 266A (101.1 MHz)
in Winona, Minnesota

HEARING DESIGNATION ORDER

Adopted: May 31, 1991; Released: June 13, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. MPR requested dismissal of its application on January 24, 1991. It has indicated that it has not entered into any agreement nor received any consideration for this dismissal. Pursuant to that request, its application will be dismissed below.

3. Each of the remaining applicants proposes to utilize the existing tower of television translator station K74CZ, Winona, Minnesota. Several applicants note that the licensed geographical coordinates for that facility (44 degrees, 01 minutes, *15* seconds NL; 91 degrees, 34 minutes, *35* seconds WL) are in error and have indicated that the correct coordinates are 44 degrees, 01 minutes, *18* seconds NL; 91 degrees, 34 minutes, *24* seconds WL. [1] The site elevation and tower height above ground (AGL) values submitted by most applicants (366 meters and 107 meters, respectively) agree with the values set forth in Commission records. However, the following applicants have items which do not match:

Ear-365 meters (site elevation)

R & B-106 meters (tower height AGL)

Inasmuch as these two applicants propose to locate on a existing tower which is recognized in official Commission records, these discrepancies are not considered tenderability or acceptability defects, and the applications have been accepted for filing. However, the discrepancy must be cured with a corrective amendment filed within thirty days of the release of this *Order*. Additionally, in light of these discrepancies, we are concerned about the accuracy of Commission records with respect to the K74CZ tower. Accordingly, an air hazard issue will be specified against each applicant in this proceeding.

4. *WRC*. Ray L. Wheeler is 50 percent stockholder, officer, and director of the licensee of FM station KWNO, Winona, Minnesota. Ahna Wheeler is an officer of that corporate licensee. Ownership of these two broadcast interests would violate the Commission's multiple ownership rules, 47 C.F.R. § 73.3555. However, Ray L. Wheeler and Ahna Wheeler have indicated their intent to terminate their relationship with KWNO in the event of grant of the referenced application. Accordingly, in the event of grant of WRC's application, Ray L. Wheeler and Ahna Wheeler will be required to sever all connection with KWNO prior to the commencement of program test authority.

5. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed. .

APPLICANT	AMENDMENT FILED
WRC	September 17, 1990

6. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

[1] Some applicants note that K74CZ intends to correct its coordinates on record with Commission.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Ear, Ingstad, Home, WRC, and R & B would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this *Order*, Ear and R & B shall file corrective amendments in accordance with paragraph 3 hereinabove.

10. IT IS FURTHER ORDERED, That in the event of a grant of WRC's application, Ray and Anna Wheeler shall divest themselves of all interest in and sever any connection with, Station KWNO(FM), Winona, Minnesota.

11. IT IS FURTHER ORDERED, That the petition for leave to amend filed by WRC IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the application of MPR IS DISMISSED.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the Air Hazard issue only.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, DC 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, DC 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-154

In re Applications of

SAGA COMMUNICATIONS OF ILLINOIS, INC. (Hereafter "Saga")	File No. BPH-891227MH
BENJAMIN STRATEMEYER (Hereafter "Stratemeyer")	File No. BPH-891228MG
HILLSBORO BROADCASTING COMPANY (Hereafter "HBC")	File No. BPH-891228MN

For Construction Permit
for a New FM Station on Channel 259B
in Hillsboro, Illinois

HEARING DESIGNATION ORDER

Adopted: May 31, 1991; Released: June 13, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Saga filed an amendment on August 13, 1990, to report changes in the corporate ownership of the application. The amendment added two new corporate officers to the corporation: Steve Goldstein and Rex Hensen. While Goldstein was listed in the original application as an officer of the applicant's parent company, the amendment is the first time Hensen is listed as a principal of the applicant. The amendment is incomplete as it fails to contain pages 4 and 5 of Section II (Items 7-12) pertaining to Hensen's legal qualifications. Accordingly, Saga will be required to submit this information to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. The applicant below has petitioned for leave to amend its applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Saga	August 13, 1990, November 14, 1990 December 10, 1990 April 29, 1991

4. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Saga and HBC would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

5. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Saga and HBC would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Saga shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order which contains the information required by pages 4 and 5 of Section II of FCC Form 301 with respect to Rex Hensen.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Saga ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extend indicated herein.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be ad-

dressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, DC 20554. Additionally, a copy of each amendment filed in this peoceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, DC 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-156

In re Applications of

TWINLAKES COMMUNICATIONS (hereafter "Twinlakes") File No. BPH-900419MT

REID D. RIPPETOE (hereafter "Rippetoe") File No. BPH-900423MY

For Construction Permit for a New Commercial FM Station on Channel 224A in Russell Springs, Kentucky

HEARING DESIGNATION ORDER

Adopted: May 31, 1991; Released: June 13, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Section II, Item 6 (new form) of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Twinlakes has not completed Item 6 correctly. Twinlake's application does not give a specific street address for its principals Alan and Jane Reed. Accordingly, Twinlakes must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

3. Data submitted by the applicants indicate there would be a significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Twinlakes shall submit an amendment which contains the information required by Section II, Item 6 (new form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

7. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, DC 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, DC 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-153

In re Applications of

Heart of Georgia Broadcasting (hereafter "Heart of Georgia") File No. BPH-891204MK

William A. Culpepper (hereafter "Culpepper") File No. BPH-891206MF

Chauncey Broadcasting, Inc. (hereafter "Chauncey") File No. BPH-891206MI

For Construction Permit for a New FM Station on Channel 267C2 in Chauncey, Georgia

HEARING DESIGNATION ORDER

Adopted: May 31, 1991; Released: June 13, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Chauncey*. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Chauncey has not completed Item 6 correctly. Chauncey's application gives a post office box number as the residence address for Terry Coleman, Lace Futch, James Shaw, Sr., and Larry Walker. Accordingly, Chauncey must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge within 30 days after this Order is released.

3. On January 22, 1990, Chauncey filed a motion to dismiss Culpepper's application. On March 19, 1990, in response to *Public Notice* Report No. 14690, released March 16, 1990, wherein Culpepper's application was listed as tendered for filing, Chauncey wrote a letter restating that the Culpepper application should be dismissed. Subsequently, on May 8, 1990, Chauncey filed a petition to deny Culpepper's application as having been erroneously accepted for tender, reiterating the same points made in its previous correspondence. Specifically, Chauncey states that on page 1 of Culpepper's application, the name of the applicant is listed as "William A. Culpepper," while on page 3 it is stated that the applicant is owned by William A. Culpepper, an "Individual Applicant." However, Chauncey states that the "engineering section of Culpepper's application appears to have been prepared *for another application*, " citing Section V-B which lists the applicant as "Do Tell Limited Partnership." Moreover, Chauncey states that throughout the engineering portion of the Culpepper application, the applicant is repeatedly identified as "Do Tell Limited Partnership." Chauncey contends that these discrepancies are tenderability defects justifying the dismissal of the Culpepper application.

4. In response to Chauncey's motion to dismiss, on January 25, 1990, Culpepper filed an opposition to motion to dismiss, wherein he contends that the discrepancies cited by Chauncey are immaterial errors and therefore meaningless. In addition, Culpepper contends that no authority exists to substantiate Chauncey's claims that dismissal is warranted in this case.

5. We agree with Culpepper. In Appendix D of the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (1985), the Commission established the criteria to be used in evaluating the substantial completeness of applications. The only criterion relevant to Chauncey's claims is that the applicant's name and address must be provided. The purpose of this requirement is to enable the staff to communicate with the applicant concerning the contents of the application and to discern and resolve issues relating to the applicant's identity, e.g., multiple-ownership and alien-interest questions. Though Culpepper did cite different names for the applicant in Sections I and V-B, this did not subvert the intent of the criterion at issue, since both his name and the correct form of his address were listed in the appropriate spaces. Consequently, this discrepancy is not a tenderability defect and therefore dismissal of Culpepper's application is not warranted. The motion to dismiss and petition to deny will be denied.

6. The sites proposed by all parties in this proceeding conflict with a pending Rulemaking proceeding to add a frequency in Cusseta, Georgia on Channel 267A (Docket No. 90-373). *See, Notice of Proposed Rulemaking*, 5 FCC Rcd. 5175 (1990). In order to accommodate the requested Channel 267A at Cusseta and comply with the Commission's minimum distance separation requirements, it was necessary to place a site restriction on the Cusseta allotment to avoid short spacings to Channel 267C2 in Chauncey. This site restriction, required so to accommodate the two channels, meets the spacing requirements only at the reference coordinates for Channel 267C2 at Chauncey, but not by the applicants for the Chauncey frequency, each of whom have proposed transmitter sites that are now short-spaced to the proposed Cusseta allotment. It is established Commission policy that rulemaking proposals which provide public service benefits are generally preferred over applications which represent a preference for particular sites. *See, Andalusia , AL*, 49 Fed. Reg. 32201, August 13, 1984, and *Las Vegas, NV*, 51 Fed. Reg. 9453, March 19, 1986. Accordingly, the applicants for Channel 267C2 in Chauncey will be allowed to proceed to hearing. However, the ultimate construction permit issued to the successful applicant in the Chauncey proceeding will be made contingent upon the outcome of the Cusseta, Georgia, Channel 267A Rulemaking proceeding

7. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and Heart of Georgia have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Heart of Georgia

would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. Since no determination has been received from the FAA as to whether the antenna proposed by Culpepper would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Heart of Georgia and Culpepper would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That Chauncey shall submit an amendment which contains the information required by Section II, Item 6 (June 1989) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

13. IT IS FURTHER ORDERED, That the motion to dismiss and petition to deny filed by Chauncey against the Culpepper application ARE DENIED.

14. IT IS FURTHER ORDERED, That the ultimate construction permit issued in this proceeding shall be conditioned as specified in paragraph 6, above.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, DC 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, DC 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-130

In the Matter of

Amendment of Section 73.202(b),	RM-6668
Table of Allotments,	RM-6960
FM Broadcast Stations.	
(Medical Lake and Davenport,	
Washington, and Sandpoint, Idaho) [1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 30, 1991; Released: June 13, 1991

By the Chief, Allocations Branch:

1. At the request of Sunbrook Communications II, L. P. (formerly Roberts Broadcasting) ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 4902 (1989), proposing the substitution of Channel 237C2 for Channel 237A at Medical Lake, Washington, and the modification of its authorization for Station KAAR(FM) to specify operation on the higher powered channel. To accommodate the upgrade at Medical Lake, the *Notice* also proposed the substitution of Channel 278A for Channel 237A at Sandpoint, Idaho, and the modification of Station KPND(FM)'s license to specify the alternate Class A channel. Petitioner filed comments supporting the allotment of Channel 237C2 to Medical Lake. Blue Sky Broadcasting ("Blue Sky"), licensee of Station KPND(FM), filed comments in opposition. Instead, it counterproposes the substitution of Channel 237C1 for Channel 237A at Sandpoint and the modification of Station KPND(FM)'s license accordingly. [2] Reply comments were filed by petitioner, Blue Sky and Dakota Communications ("Dakota").

2. Petitioner filed comments reiterating its intention to apply for Channel 237C2, if allotted to Medical Lake, and to reimburse Station KPND(FM) for the costs involved in its change of channel. It states that Medical Lake is located in the Spokane, Washington, radio market and that upgrading Station KAAR(FM) to Class C2 status will enable it to increase its coverage area by 468%, thus increasing spectrum efficiency, as well as improving its competitive stance with regard to the Class C stations licensed to Spokane.

3. In support of its counterproposal, Blue Sky submits that Station KPND(FM) is the only commercial FM station licensed to Bonner County and that upgrading the station will enable it to provide a new service to 54,550 persons within an area of 14,477 square kilometers. Blue Sky states that it will apply for Channel 237C1, if allotted to Sandpoint. However, it proposes that both requests be accommodated by allotting Channel 270C2 or Channel 270C3 to Medical Lake and modifying Station KAAR(FM)'s authorization accordingly.

4. In comparing the proposed upgrades, petitioner recognizes that Station KPND(FM) would serve a larger area as a Class C1 facility than would Station KAAR(FM) as a Class C2. However, it argues that Station KAAR(FM), operating with C2 facilities, would provide a new service to almost 10,000 more persons than would a Class C1 Station KPND(FM). Petitioner submits that use of a channel at the greatest power possible is a more efficient use of the spectrum and thus clearly furthers the public interest, citing *Endicott, New York*, 51 FCC 2d 50, 51 (1975). However, it argues that such efficiency is not enhanced if the allotment would serve a largely uninhabited area at the expense of an allotment that would bring new service to a substantial number of people, citing *Fort Walton Beach, Florida*, 38 RR 2d 1677, 1686 (1976). In this regard, petitioner claims that the population density of the KPND(FM) gain area is 3.77 persons per square kilometer compared to a density of 9.57 persons per square kilometer, assuming use of Station KAAR(FM)'s present transmitter site, and 16.83 persons if petitioner's preferred coordinates specified in the *Notice* are used. [3] Petitioner further claims that the area enveloped within Station KPND(FM)'s gain area is extremely remote with rugged terrain that is largely national forest land and thus not amenable to development. Petitioner concludes, therefore, that Station KPND(FM)'s gain area will never include a substantial population.

5. In addition, petitioner states that upgrading Station KAAR(FM) to Channel 270 presents a greater potential for objections by the Federal Aviation Administration ("FAA") to the station's higher power operations on the grounds of interference to radionavigation equipment than to such operation on its presently licensed Channel 237. [4] Therefore, petitioner argues that the public interest will be better served by upgrading Station KAAR(FM) to specify operation on Channel 237C1, as proposed in the *Notice*. Should the Commission disagree, petitioner states that it will accept an upgrade to non-adjacent Channel 270. However, this acceptance is conditioned on the Commission modifying Station KAAR(FM)'s authorization in this proceeding and thus not putting its license at risk.

6. In reply comments, Blue Sky submits that the allotment of Channel 237C1 to Sandpoint would result in a first nighttime aural service to 5,300 persons within a 3,539 square kilometer area and a second nighttime aural service to 6,800 persons in a 4,263 square kilometer area. Therefore, it argues that the public interest would be

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[1] The community of Davenport has been added to the caption.
[2] Public Notice of the counterproposal was given on August 30, 1989, Report No. 1793.
[3] The coordinates of the alternate transmitter site for Channel 237C2 at Medical Lake are North Latitude 47-41-30 and West Longitude 117-46-00.
[4] Petitioner states that the potential for FAA concerns arises from the fact that Medical Lake is located within 10 kilometers of the Spokane International Airport and Fairchild Air Force Base.

better served by the upgrading of Station KPND(FM) to Channel 237C1 and upgrading Station KAAR(FM) to either Channel 270C2 or C3.

7. Dakota, permittee of Station KRAQ, Channel 272A, Colfax, Washington, supports Blue Sky's proposal to allot Channel 270C2 to Medical Lake by substituting channels at Davenport, Washington. Dakota states that the Davenport substitution would allow it to upgrade Station KRAQ to Channel 273C3. [5]

8. We have carefully considered both proposals and find that the public interest would be served by upgrading both Station KAAR(FM) at Medical Lake and Station KPND(FM) at Sandpoint because it could provide each community with a wide coverage area FM service. We also find that a comparison of the two proposals is not necessary because both requests can be accommodated. Although petitioner expressed concern that the FAA might raise objections to the use of Channel 270 at Medical Lake, it has not provided any specific evidence to support such a finding, instead only stating that Medical Lake's location near two airport may raise some unspecified concerns. We find that petitioner's unsupported allegations are not sufficient to undermine the allotment of Channel 270C2 to Medical Lake.

9. Channel 237C1 can be allotted to Sandpoint in compliance with the Commission's minimum distance separation requirements with a site restriction of 34.6 kilometers (21.5 miles) northeast to avoid short-spacings to Station CBTA-FM, Channel 235C, Trail, British Columbia, Canada, to unoccupied and unapplied for Channel 239C at Trail, British Columbia, and to the pending application (BPH-900816ID) of Station KLER-FM, Channel 237C3, Orofino, Idaho. Channel 270C2 can be allotted to Medical Lake in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.8 kilometers (9.2 miles) northwest to accommodate petitioner's desired transmitter site. Channel 247A can be allotted to Davenport in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction and can also be used at the site specified in the pending application. [6]

10. Davenport Radio Partnership, the applicant for Channel 273A at Davenport, will be permitted to amend its application without loss of cut-off protection. As proposed, we will also modify the authorizations of Stations KAAR(FM) and KPND(FM) in accordance with Section 1.420(g) of the Commission's Rules. Although the modification of Station KAAR(FM)'s license to Channel 270C2 represents a non-adjacent channel upgrade, no competing interest in use of the channel was received. No reimbursement requirement will be imposed on the petitioner because Blue Sky is not required to change channels in order for Station KAAR(FM) to achieve its upgrade. Canadian concurrence in these allotments have been received because Medical Lake, Davenport and Sandpoint are all located within 320 kilometers (200 miles) of the U.S.-Canadian border.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 29, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Sandpoint, Idaho	237C1, 273A
Davenport, Washington	247A
Medical Lake, Washington	270C2

12. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Blue Sky Broadcasting, Inc., for Station KPND(FM), Sandpoint, Idaho, IS MODIFIED to specify operation on Channel 237C1, in lieu of Channel 237A, and the license of Sunbrook Communications II, L. P., for Station KAAR(FM), Medical Lake, Washington, IS MODIFIED to specify operation on Channel 270C2 in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall each submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That Davenport Radio Partnership may amend its application (BPH-890906MB) for Channel 273A at Davenport, Washington, to specify operation on Channel 247A without loss of cut-off protection.

14. IT IS FURTHER ORDERED, That the Secretary SHALL SEND a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 273A at Davenport, as follows: Davenport Radio Partnership, P.O. Box 4010, Opelika, Alabama 36803.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

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[5] Based on the actions taken herein, we have confirmed that Channel 273C3 can be allotted to Colfax in compliance with the Commission's minimum distance separation requirements. Therefore, we will propose the substitution of Channel 273C3 for Channel 272A at Colfax and modification of Station KRAQ's construction permit in a separate Notice of Proposed Rule Making (RM-7691)

[6] The coordinates for Channel 270C2 at Medical Lake are North Latitude 47-41-30 and West Longitude 117-46-00. The coordinates for Channel 247A at Davenport are 47-39-06 and 118-09-06. The coordinates for Channel 237C1 at Sandpoint are 48-25-19 and 116-08-30.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-159

In the Matter of

Amendment of Section 73.202(b), RM-7719
Table of Allotments,
FM Broadcast Stations.
(Medicine Lodge, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1991; Released: June 13, 1991

Comment Date: August 5, 1991
Reply Comment Date: August 20, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Florida Public Radio, Inc. ("petitioner"), requesting the substitution of FM Channel 269C2 for Channel 240A at Medicine Lodge, Kansas. Petitioner also requests modification of its construction permit for Station KREJ, Channel 240A, to specify operation on Channel 269C2.

2. In support of the proposal, petitioner states that operation on Channel 269C2 would allow it to expand its noncommercial educational programming to a broader listener base. Petitioner further states that the allotment of Channel 240A at Woodward, Oklahoma, not only prevents an upgrade on Channel 240 at Medicine Lodge but also prevents the operation of Channel 240A as a six kilowatt facility. Petitioner points out that removal of Channel 240A at Medicine Lodge would allow Channel 240A at Woodward to be used as a six kilowatt facility. [1]

3. We believe petitioner's proposal warrants consideration. Channel 269C2 can be allotted to Medicine Lodge, Kansas, in compliance with the Commission's spacing requirements at petitioner's specified site. [2] We shall propose to modify the construction permit for Station KREJ, as requested by the petitioner, to specify operation on Channel 269C2. However, in accordance with Section 1.420(g) of the Commission's Rules, should another party indicate an interest in the Class C2 allotment, the modification cannot be implemented unless an equivalent class channel is also allotted.

4. In order to provide a wide coverage area station for Medicine Lodge, Kansas, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
Medicine Lodge, Kansas	240A	269C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 5, 1991**, and reply comments on or before **August 20, 1991**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Randy Henry, President
Florida Public Radio, Inc.
505 Josephine Street
Titusville, Florida 32796
(petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] The construction permit (BPH-851231MT) for Channel 240A at Woodward, Oklahoma, was forefeited on March 22, 1991. However, a six kilowatt station operating on Channel 240A at Medicine Lodge would still be short spaced to the reference coordinates for Channel 240A at Woodward.

[2] The coordinates for Channel 269C2 at Medicine Lodge are 37-13-58 and 98-39-43.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-160

In the Matter of

Amendment of Section 73.202(b), RM-7718
Table of Allotments,
FM Broadcast Stations.
(Sterling, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1991; Released: June 13, 1991

Comment Date: August 5, 1991
Reply Comment Date: August 20, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Early Williams ("petitioner") requesting the allotment of FM Channel 239A to Sterling, Kansas, as that community's first local broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 239A can be allotted to Sterling, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 4.6 kilometers (2.9 miles) southwest of the community. [1] The site restriction will prevent a conflict with Station KQNS-FM, Channel 240A, Lindsborg, Kansas.

3. In view of the fact that the proposed allotment would provide a first local broadcast service to Sterling, Kansas, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Sterling, Kansas	---	239A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 5, 1991,** and reply comments on or before **August 20, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Early Williams
2301 - 22nd Street West
Bradenton, Florida 34205
(petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

[1] The coordinates for Channel 239A are 38-10-56 and 98-14-27.

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-161

In the Matter of

Amendment of Section 73.202(b), RM-7701
Table of Allotments,
FM Broadcast Stations.
(Jasper, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 31, 1991; Released: June 13, 1991

Comment Date: August 5, 1991
Reply Comment Date: August 20, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James M. Lout ("petitioner"), requesting the allotment of Channel 297A at Jasper, Texas, as the community's third local FM transmission service. Petitioner states he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 297A to Jasper, Texas, since it could provide the community with its third local FM transmission service. Channel 297A can be allotted to Jasper in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.5 kilometers (0.9 miles) north of the community to avoid a short-spacing to the vacant allotment of Channel 297C3, Lake Arthur, Louisiana. [1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Jasper, Texas	264C2, [2] 274C2	264C2, 274C2, 297A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 5, 1991,** and reply comments on or before **August 20, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:.

Julian P. Freret, Esq.
Booth, Freret & Imlay
1920 N Street, N.W., Suite 150
Washington, DC 20036
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] The coordinates for Channel 297C3 at Jasper are North Latitude 30-56-13 and West Longitude 93-59-47.

[2] We note that Roy A. Henderson, d/b/a Timberline Communications, licensee of Station KJAS(FM), has a counterproposal pending in MM Docket No. 90-90, 5 FCC Rcd 1274 (1990), requesting to relocate Station KJAS(FM), Channel 264C2, from Jasper to Winnie, Texas.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

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(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-183

In re Applications of

WOODS COMMUNICATIONS GROUP, INC.	File No. BPCT-870904KJ
PEARS BROADCASTING INC.	File No. BPCT-871109KF
GILES TELEVISION, INC.	File No. BPCT-871110KE
CALDWELL BROADCASTING LIMITED PARTNERSHIP	File No. BPCT-87111OKH
KTVE, INC.	File No. BPCT-871110KL

For Construction Permit for
New Television Station,
Channel 11,
Columbia, Louisiana

Appearances

John B. Kenkel and Scott Cinnamon, on behalf of Wood Communications Group, Inc.; *John T. Scott, III, and William D. Wallace*, on behalf of Pears Broadcasting, Inc.; *William J. Sill, Donald J. Evans, and James A. Kline, IV*, on behalf of Giles Television, Inc.; *James P. Denvir*, on behalf of Caldwell Broadcasting Limited Partnership; and *Robert A. Beizer, R. Clark Wadlow, and Evan D. Carb*, on behalf of KTVE, Inc.

DECISION

Adopted: June 4, 1991; Released: June 14, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL. Board Member ESBENSEN not participating.

1. The Review Board has under consideration an *Initial Decision*, 5 FCC Rcd 5859 (1990) (*I.D.*), by Administrative Law Judge Richard L. Sippel (ALJ), granting the application of Pears Broadcasting, Inc. (Pears) for a new television station on Channel 11, Columbia, Louisiana, and exceptions thereto, filed by the above-captioned applicants. Oral argument was held before the Board on February 22, 1991.

2. Employing the criteria set forth by the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), for adjudicating the standard comparative issue, the ALJ's selected Pears as the preferred applicant, primarily based on a finding that it was the only applicant in this proceeding entitled to 100% ownership/management "integration" credit. *I. D.*, 5 FCC Rcd at 5869.[1] With respect to its competitors, KTVE, Inc. (KTVE) proposed no integration and received none; Caldwell Broadcasting Limited Partnership (Caldwell) also claimed a 100% quantitative factor, but was found to be a "sham," and the applicant received no integration credit; Wood Communications Group, Inc. (Woodscom) was denied credit on the ground that its proposal was not permanent; and Giles Television, Inc. (Giles) received only 40% of its claimed 100% credit, because its 60% putative "limited" partner was found to be in partial control of the applicant. The ALJ went on to state, however, that assuming *arguendo* the respective applicants received their sought-after 100% quantitative integration credit, Pears would still prevail qualitatively, closely followed by Caldwell, because of: (1) the 11-year residence in the city grade contour by Pear's 20% integrated principal, Tom D. Gay, enhanced by his local civic activities; (2) the pledge to move to Columbia by its 80% principal; and (3) their combined past broadcast experience. *Id.* For the reasons set forth below, however, we reverse the failure of the ALJ to award integration credit to Caldwell, and hold that the latter should prevail under the Commission's comparative criteria.

3. In choosing between applicants with virtually identical quantitative integration proposals, the Commission looks to the qualitative attributes of the integrated owners (local residence/civic activities, minority ownership, female ownership, and broadcast experience). *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065 (1989)(subsequent history omitted); *see also Ronald Sorenson*, FCC 91-93, released April 9, 1991 (civic activities and local residence). Local residence and minority ownership are fundamental considerations in this qualitative analysis and receive the greatest weight. As for local residence, "residence in the community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service areas." *Policy Statement*, 1 FCC 2d at 396. "Proposed future local residence . . . will also be accorded less weight than present residence of several year's duration." *Id.* Previous broadcast experience is "deemed of minor significance." *Id.*; *cf. Swan Broadcasting Limited*, 6 FCC Rd 17, 21 (Rev. Bd. 1991)(100% female ownership accorded more weight than 100% past broadcast experience).

4. Here, Caldwell's 49% and 25% principals have been Columbia residents since 1963 and 1959, respectively; and the remaining 26% principal possesses, like Pear's 20% principal, service area residence. They, too, are actively involved in community and service area civic activities. Additionally, Caldwell's proposed integrated principals are entitled to 49% minority ownership and 100% female ownership enhancements, and its 49% principal also has slight past broadcast experience. Thus, it is clear that, even on a cursory review, Caldwell -- if entitled to its claimed quantitative credit -- would prevail *qualitatively*

over Pears. Moreover, Giles, if awarded its full quantitative integration credit, would rank second, on the strength of its 100% minority ownership enhancement.[2] It would trail behind Caldwell, however, because Caldwell's 100% local and service area residence (enhanced by civic involvement), 100% female ownership, 49% minority ownership, and 49% past broadcast experience (even if slight) are, in combination, of greater weight than Giles' singular 100% minority ownership enhancement.[3] The remaining two applicants are not comparatively competitive, because KTVE has sought no integration credit,[4] and Woodscom's qualitative integration enhancements are inferior, and it received a substantial diversification demerit.[5]

CALDWELL BROADCASTING LIMITED PARTNERSHIP

5. The ALJ denied all integration credit to Caldwell, characterizing the applicant a "sham," based on a finding that Caldwell's principal, Betty J. Robinson, had not taken an active role in the applicant. *I.D.*, 5 FCC Rcd at 5869. Robinson, a 49% shareholder of Caldwell's sole general partner, Caldwell Communications Corporation (CCC), and one of three CCC principals proposed to work full-time, represented that she would work as director of public service broadcasting and director of community affairs. *Id.*, at 5866. The ALJ was persuaded, however, that her inclusion in the application was merely to garner a female minority preference, and that she had not exercised or shared in any decisional control. *Id.*, at 5865. He noted, for example: (1) testimony by Mary Lou Winters, president and 26% shareholder of CCC, that Robinson had been apportioned 49% of the stock in order to maximize the applicant's preference for women and minorities (*id*); (2) that, although Robinson's name was listed as lead petitioner on comments to the Commission seeking the Columbia frequency allocation, she never read the pleading until after it had been filed (*id.*); (3) that, although vice-president and a director of CCC, Robinson was not a member of its informal "executive board" which conducted the business of CCC, and was only subsequently notified of decisions made by Winters and the remaining 25% integrated principal, Clarice Kenney (*id.*); and (4) that, although formerly treasurer, Robinson's name did not appear on the bank's signature card. *Id.*

6. The ALJ further believed that, under the Caldwell limited partnership agreement, a director of the corporate "general" partner (CCC) is removable by the "limited" partners if subject to a bankruptcy proceeding; and that Robinson is required to repay over $15,000 in the loans from Winters and Kenney used to meet additional capital calls. *Id.* The ALJ opined that Robinson's precarious financial position makes her "unreasonably beholden" to creditors Winters and Kenney, and to the "limited" partners for foregoing possible foreclosure procedures. *Id.* While he found that both Winters and Robinson played active roles in the applicant, he denied Caldwell's entire integration proposal in light of the "make-belive roles" assigned to Robinson. Alternatively, the ALJ found that Robinson made no commitment to resign her current full-time teaching position; and when coupled with an extensive involvement in community civic activities, it was patently unreasonable that the Caldwell principals ever expected her to fulfill her full-time integration commitment *Id.*, at 5865, 5869).

7. Caldwell excepts to the *I.D.*'s unfavorable conclusions. Although acknowledging that one of the reasons Robinson was invited to join the applicant was because she would comparatively enhance Caldwell's application, it contends that she was also chosen because she knew several members of the group (Tr. 905-906), was considered very competent (Tr. 923), and was the only member of the "general" partner with any broadcast experience. Caldwell Exh. 4, p. 2. Caldwell contrasts the ALJ's treatment of Robinson with that accorded to Pear principal, Tom Gay, whose application was not questioned, notwithstanding testimony by Pear's 80% shareholder that Gay was chosen because his local residence would similarly qualitatively enhance the Pears' application. Tr. 429. Second, Caldwell argues that the inclusion of Robinson's name on comments earlier filed in the Caldwell frequency allocation proceeding does not detract from the *bona fides* of her participation in the applicant. It asserts that she was an active member of the investment group seeking the allocation for two years prior to the filing of Caldwell's application, had borne her *pro rata* share of the group's expenses, and was not the only member of the group who did not read the comment pleading beforehand. H.I. Schendle, who eventually became a Caldwell "limited" partner, was the "quarterback" and the individual most heavily involved in securing the frequency allocation to Columbia; and, Caldwell concedes, Schendle deliberately stressed the substantial involvement of women and minorities. Caldwell Reply at 7-10. The allocation comments were filed in the names of Betty Robinson, Mary Lou Winters, Cynthia Woodard, Adrienne K. LaFrance, Clarice Kenney, Schendle, and Joseph H. Miller, Jr., and signed by their attorneys. Giles Exh. 13. Robinson, Winters, Woodward, and Miller all conceded that they had not read the comments prior to filing, although they were actively interested members of the group, and had given permission for their names to be used. Tr. 919, 1000, 1003, 1506-1508, 1673-1675. Except for the three CCC partners, the above individuals are "limited" partners of this applicant. Caldwell Exh. 1.

8. Third, Caldwell disputes that the record supports a finding that the business of CCC is conducted by an informal "executive board." The board, comprised of CCC's president and secretary/treasurer (*i.e.*, Winters and Kenney, respectively), is authorized by the corporation's bylaws to transact CCC's business during intervals between meetings of the board of directors. Giles Exh. 26 (Art. II, Sect. 3). But Caldwell states that this has little substantive significance, and that all significant decisions affecting the applicant have been made by consensus of the three principals. It refers to Kenney's testimony that no significant decisions were made without consultations among all three CCC principals; and that, on minor matters, action was taken by two of the principals (*i.e.*, either Winters and Kenney or Kenney and Robinson, with the third principal being subsequently informed). Tr. 1279-1280. Caldwell further asserts an internal inconsistency in the ALJ's findings; first, that Robinson did not participate in the meetings, and second, that Kenney advises Robinson of the meetings she needs to attend. *See I.D.*, 5 FCC Rcd at 5865. Caldwell notes that Robinson was originally secretary/treasurer, thus belying any implication that the intent of the board was to exclude Robinson from decisional control. Tr. 1093. It also maintains that, during the formative stages of the application, the three CCC principals were receiving between six and eight telephone calls per day from counsel and daily mail

by Federal Express. They mutually decided that, since Robinson was a classroom teacher, it would not be practicable at that time for her to serve as secretary-treasurer. *Id.* Caldwell further adverts to those portions of the transcript reflecting that Robinson was primarily responsible for preparing the EEO section of the application (Tr. 1210); assisted in preparing the cost estimates for constructing and operating the station (Tr. 1206-1210, 1220-1221); contacted Caldwell's engineer to obtain cost estimates (Tr. 1212); participated in decisions to hire, and then to change, counsel, (Tr. 1235-1236); and participated in structuring Caldwell's "general" partner as a corporation and establishing the division of stock ownership. Tr. 988-989, 1160.

9. Fourth, Caldwell objects to the negative implication drawn by the ALJ from the omission of Robinson's name from the bank's signature card. It states that all three CCC principals, including Robinson, are authorized to write checks for CCC, *see* Giles Exh. 25; Tr. 1095-1096. And it it further invokes the record testimony that Robinson's teaching schedule conflicted with banking hours and to explain why others eventually assumed the task of paying Caldwell's bills. Tr. 1093-1094, 1162. Fifth, Caldwell takes issue with the ALJ's finding that the record concerning Robinson's finances detracts from the *bona fides* of her participation. It contends that Robinson put up $1000 of her own funds to meet her share of the initial capital call, Tr. 1182, 1186-1187; that she is fully responsible for contributing her 49% *pro rata* share of all capital calls made to CCC, Tr. 1085-1087, 1167-1169; that, although she has borrowed funds from Winters and Kenny, the loans were made at the prevailing interest rates, evidenced by notes, and, at Robinson's suggestion, secured by her CCC stock, Tr. 1179-1190; Giles Exh. 19, 20, 21, 24; and that she has been making regular payments of $400 per month to pay off the loans from Winters and Kenney, with over $5000 having been paid at the time of the hearing. Tr. 1182. Caldwell also maintains that Robinson will remain liable for any outstanding amounts under the loan, even if it does not receive the license. Giles Exh. 20, 21, 24.

10. Finally, Caldwell contends that the ALJ erred in concluding that Robinson would not be able to effectuate her integration proposal because of her current teaching position and civic activities. While Caldwell acknowledged at oral argument that it had somehow inadvertently omitted from the final version of its integration statement an explicit pledge from Robinson to resign her teaching position, Tr. 1975-1976, it argues that there is other substantial evidence in the record to show that she intends to resign her teaching position if Caldwell's application is granted. First, it points to Winter's testimony that there were initially four principals who were willing to retire or resign from their present occupations to pursue the television license: Kenney, Robinson, Cynthia Woodard, and herself. Tr. 949-950. Woodard, a practicing attorney, subsequently became a "limited" partner. Tr. 950-953; 980-983. Second, it argues that the partnership agreement contractually obligates Robinson, Winters, and Kenney to devote at least 40 hours per week to the management of the station and prohibits them from engaging in any other venture if the effect of such participation would be to materially interfere with their personal participation in the management of the station on a full-time basis. *See* Giles Exh. 16 (Sect. 6.1). Finally, it refers to Robinson's testimony at hearing that she will work a minimum of 40 hours per week at the station in her proposed managerial positions. Tr. 1222. With respect to her civic activities, Caldwell argues that Robinson has successfully combined for many years a full-time teaching position with her extensive civic activities, and that her success at handling both activities is more than adequate evidence that her civic activities will not prevent her from fulfilling her full-time managerial position at the station.

11. Giles also excepts to the *I.D.*, contending that additional bases than those found in the *I.D.* exist for discounting Caldwell's integration proposal. It argues that the interests of the "limited" partners are attributable to Caldwell, because they, and particularly Schendle, were the prime movers in securing the frequency allocation to Columbia. It further argues that the contract provision permitting the "limited" partners to remove the "general" partners runs counter to the requisite FCC insulation barriers. Finally, Giles contends that Caldwell is not entitled to integration credit for Mary Lou Winter's proposed participation in any event, because Winters failed to propose to terminate her formal positions as secretary of two family businesses.

12. In response, Caldwell acknowledges that Schendle played a leading role in the informal group of local investors during the allocation proceeding from mid-1984 until June 1987, when the allocation was made to Columbia; but it argues that once the investor group decided to structure the applicant as a limited partnership in July 1987, Schendle's role became entirely passive. Caldwell references, for example, testimony by both Winters and Schendle that Schendle ceased his active involvement once the allocation was accomplished, did not attend meetings after July of 1987, and actually moved from Louisiana to Dallas, Texas. Tr. 946, 952-953, 1781, 1855-1856, 1864-1865. Caldwell further refers to Schendle's testimony that he did not know with which banks Caldwell had accounts (Tr. 1877); that he was not involved in putting together the limited partnership (Tr. 1881); that he never reviewed the application prior to its being filed (Tr. 1894); and that he was never aware of any meetings of the Caldwell group after July or August of 1987. Tr. 1887. Caldwell also notes that Schendle transferred his interest in Caldwell to an irrevocable *inter vivos* trust for his two children in December 1989. Tr. 1902-1903; Giles Exh. 18.

13. Caldwell further submits that Giles is in error in asserting that the Caldwell "limited" partners may remove a "general" partner, more particularly Robinson, by initiating bankruptcy proceedings against its individual shareholders. It states that, under the partnership agreement, the "limited" partners are prohibited from initiating such proceedings for the purpose of removing the "general" partner. *See* Giles Exh. 16 (Sect. 10.2(e)). Finally, Caldwell argues that it met its burden of proof regarding the effectuation of Winter's integration proposal. It points to Winter's pledge to quit her full-time position as business manager for her husband's medical practice in the event Caldwell's application is granted (*see I.D.*, 5 FCC Rcd at 5866), her testimony that she and three others were willing to retire or resign from their occupations to pursue the license (Tr. 949), and the partnership agreement provision that legally obligates her to terminate any employment that would conflict with her devoting 40 hours per week to the station. *See* Giles Exh. 16 (Sect. 6.1).

14. *Discussion*. The Commission recently set forth a more comprehensive statement of the principles governing the disposition of defective integration proposals. *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990), *recon. denied*, FCC 91-125, released, May 16, 1991. It there stated that (emphasis added):

> where the applicant has failed to demonstrate reliably that nominally controlling principals will in fact exercise control or has otherwise left fundamental uncertainty about the true nature of its organizational structure, we have no basis for awarding any integration credit at all. *The ownership and control of the applicant may be shown to be fatally uncertain because ... the assertedly active principal has exercised little, if any, significant control over the applicant and has not shown any real prospect of doing so.* Such situations provide no basis for awarding even partial credit because the control of the applicant as between integrated and nonintegrated principals cannot be reliably ascertained, and, thus, we will discount such proposals completely.

In *Royce*, where all credit was denied, the *de jure* "general" partner was found to be "little more than the instrument of her brother's strategic plan" for the local broadcast market. *See id.*, at 7064. The ostensible "general" partner there conceded that, contrary to the organizational structure of the applicant, she would look to her brother for guidance in operating the station. *Id.* The Board addressed a similar "paper proposal" in *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 932-934 (Rev. Bd. 1991), where the putative 49% "general" partner admitted at hearing that the 51% "general" partner: (1) could fire her as an employee if he so decided; (2) could set her employee compensation at any amount; (3) could change the station's format without her consent; and (4) could establish every facet of station policy. *See id.*, at 933. In addition, the 51% "general" partner there gathered all of the information necessary for, and he prepared, the Atlantic City application. *Id.* The Board merely affirmed the ALJ's denial of the 49% proposal -- it being unnecessary to reach the question whether the entire proposal should have been discounted. *Id. See also Cuban - American Limited*, 5 FCC Rcd 3781, 3786 n.4 (1990) (lack of active participation in, or knowledge of, the applicant's affairs in their current role as directors undermined the reliability of integration proposals).

15. Here, there is no fundamental uncertainty about the true nature of the Caldwell organizational structure. Virtually from the outset until the present time, Robinson has been an interested and active participant in the Caldwell investor group, first, in assisting efforts to secure the allocation; and subsequently, in prosecuting the application. Although an applicant is permitted to tailor its integration proposal in a manner that is believed most likely to prevail in a comparative hearing, providing the proposal is *bona fide*, *see KIST Corp.*, 102 FCC 2d 288, 292 n.9 (1985)(subsequent history omitted), Robinson's participation in the allocation efforts prior to the formation of the limited partnership applicant logically strains a conclusion that she was added only as a "paper principal" to artifically enhance Caldwell's integration proposal, particularly since its integration proposal was finalized only two years *after* she joined the applicant group. Moreover, the record discloses that Robinson, along with Winters and Kenney, became a shareholder of the "general" partner because other original members of the informal investment group were unwilling to abandoned their current occupations. Had this applicant sought a purely artificial enhancement, it could have structured itself in an even stronger comparative position (*e.g.*, by artificially integrating Miller, which would have augmented Caldwell's minority ownership enhancement). Its refusal to do so undercuts the notion that it deliberately crafted a "sham" integration proposal. In any event, the record amply demonstrates that Robinson was significantly involved in the applicant's decision-making processes,[6] and that she has a genuine financial stake in the applicant. The areas of concern cited by the *I. D.*, including whether Robinson would effectuate her proposal, have been satisfactorily answered by Caldwell. *See Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1242 (Rev. Bd. 1987) (subsequent history omitted) (principal's effectuation intentions can be shown by factual proof or permissible inferences therefrom).[7]

16. Moreover, although Robinson's stock serves as collateral for her loans from Winters and Kenney, she has already repaid two of the installment loans. *See* Giles Exh. 20, 21, and there is no evidence that she will not be able to meet future payments on the outstanding loans.[8] This situation differs significantly from *George Henry Clay*, 5 FCC Rcd 317, 319-320 (Rev. Bd. 1990), where we denied integration credit to an applicant whose equity share was entirely dependent upon her ability to meet her *pro rata* capital contributions, but had accumulated approximately $50,000 in personal debts, including an IRS tax lien against her for $7,405, and had lost her business office and perhaps her home. Finally, Caldwell's reply brief fully rebuts Giles' allegations that the equity interests of the "limited" partners are attributable to Caldwell and/or that Winters will not be able to effectuate her proposal. The Commission has previously held that it will not generally attribute the interests of passive owners to an applicant for integration purposes, even where they were active in initiating or financing the application, providing that the applicant has adopted an ownership structure whereby the previously active owner[s] have evinced a passive role, and the applicant thereafter adheres to that changed ownership structure without exception. *Coast TV*, 5 FCC Rcd 2751, 2753 (1990). That was done here. Nor is there, as in cases such as *Royce*, strong evidence here that the application structure is wholly disingenuous, the totality of the record considered. Finally, in light of the ALJ's finding that Winters will simply exchange her current full-time position as her husband's medical practice business manager for her future role as the station's full-time general manager, *see I.D.*, 5 FCC Rcd at 5866, her integration proposal will be likewise credited.

17. In sum, we perceive no adequate legal basis for denying Caldwell its full integration credit. Based on its qualitative enhancements enumerated in para. 4, *supra*, a grant of Caldwell's application will best serve the public interest, convenience, and necessity.

18. ACCORDINGLY, IT IS ORDERED, That the application of Caldwell Broadcasting Limited Partnership (File No. BPCT-871110KH) for a new television station on Channel 11, Columbia, Louisiana IS GRANTED; and that the applications of Woods Communications Group, Inc. (File No. BPCT-870904KJ), Pears Broadcasting, Inc.,

(File No. BPCT-871109KF), Giles Television, Inc. (File No. BPCT-87111OKE), and KTVE, Inc. (File No. BPCT-87111OKL) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Participation in station operation by owners is considered to be a factor of substantial importance in providing the best practicable service to the public, since it joins legal responsibility and day-to-day performance. *Policy Statement*, 1 FCC 2d at 395. In ascertaining the quantitative "integration" percentage involved, the Commission looks to the percentage of voting ownership that will be "integrated" at the station. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 816 (Rev. Bd. 1982), *review denied*, FCC 83-368 released September 15, 1983, *aff'd in part, reversed in part on other grounds*, 753 F.2d 1132 (D.C. Cir. 1985); *see also Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8150 (Rev. Bd. 1989)(subsequent history omitted).

[2] The percentage of qualitative credit awarded to the applicant is proportionate to the quantitative ownership of the respective integrated principal. *See Debra D. Carrigan*, 104 FCC 2d 826, 833 (1986)(subsequent history omitted).

[3] Giles contends that it is entitled to a coverage preference *vis-a-vis* Caldwell, because it would provide a new combined third and fourth television service to 3927 persons more than Caldwell's proposal. The third service disparity is only 482 persons in proposed service areas of more than 720,000 population, respectively. The ALJ found the differences in coverages *de minimis*. We agree that the combined numbers here, representing approximately 0.5% of the Caldwell total service area, are statistically insignificant and too miniscule to be decisional. *See generally Mark L. Wodlinger*, 100 FCC 2d 762, 773 (Rev. Bd. 1985). Exceptions by Giles that it is entitled to 100% quantitative integration credit, and by its competitors that Giles is not entitled to any integration credit, are non-decisional in light of our disposition, and will not be considered. Similarly, Caldwell's exceptions asking for qualifying issues against Giles based on alleged misconduct toward its principals are denied as non-decisional.

[4] In candid concession, KTVE points out that the ALJ inadvertently failed to also charge it also with a diversification demerit based on its media interests, which include television stations in Albany, Georgia and Panama City, Florida, and a daily newspaper in Albany, Georgia. KTVE Br. at 27; *I.D.*, 5 FCC Rcd at 5861-5862. Although it argues for a slight demerit only, Giles would augment the diversification demerit assessed against KVTE by also attributing the extensive media interests (detailed in n.3 of the *I.D.*) of KTVE's 11.4% shareholder. KTVE, in opposition, cites *Attribution of Ownership Interest*, 97 FCC 2d 997, 1022-1023 (1984), and the Board's decision in *Doylan Forney*, 3 FCC Rcd 6330, 6337 (Rev. Bd. 1988), for support that the media interests of corporate minority shareholders are not attributable unless the shareholders are officers or directors of the corporation. However, the Commission on review of *Forney* explicity stated that *Attribution* was not applicable in the comparative diversification context, asserting that the diversification factor is intended to further a maximum diffusion of control of the media of mass communications. 5 FCC Rcd 5423, 5427 (1990). Thus, we agree with the exception that a strengthened demerit attaches to KTVE because of its minority shareholder's media interests. In light of both its inferior integration and diversification posture, KTVE's exceptions that the ALJ erred, both in failing to allow adduction of evidence concerning its past broadcast record at station KTVE(TV), El Dorado, Arkansas (of which it is the current licensee) so it could claim a past broadcast record preference, and in failing to award it a coverage preference for serving a greater population are non-decisional, and not reached here. *See Ramon Rodriguez & Associates*, 4 FCC Rcd 6817, 6818 (Rev. Bd. 1989)(substantial preference for past broadcast record can not overcome a significant diversification demerit), *review denied*, 5 FCC Rcd 4041 (1990); *Louisiana Super Comm. Ltd. Partnership*, 102 FCC 2d 1293, 1308 (Rev. Bd. 1985)(substantial integration preference significantly outweighs slight coverage preference).

[5] Woodscom does not except to its substantial diversification demerit and only proposes to work at the station 20-40 hours per week the first year, after which time he would not be present at the station. The *Policy Statement* requires a permanent commitment, however, for an applicant to be entitled to integration credit. 1 FCC 2d at 395 n.6. Woodscom claims a coverage preference, but such a preference could in no way overcome its diversification demerit, by itself, *see WFSP, Inc.*, 99 FCC 2d 444, 446 (Rev. Bd. 1984). Woodscom, which currently has a network-affiliated UHF television station, KARD-TV, located at Monroe, Louisiana, and which it is willing to divest itself in return for the instant VHF construction permit at Columbia, also relies loosely on *Knoxville Broadcasting Corp.*, 103 FCC 2d 669 (Rev. Bd. 1986) for equitable relief (i.e., claiming that in all likelihood its UHF station will lose its network affiliation to the VHF permittee). It unsuccessfully sought to introduce evidence concerning KARD-TV's community service. In *Knoxville*, the Board awarded a local UHF licensee the construction permit for a newly available VHF frequency in that same community. Unlike here, however, *Knoxville* was an singular situation following a controversal VHF "drop-in" proceeding, whereby the Commission specifically invited adversely impacted licensees to rely on their past performances. *See Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3957-1958 (Rev. Bd. 1988) (rejecting similar argument)(subsequent history omitted). In any event, Woodscom had an opportunity to establish that it was entitled to a past broadcast record preference, *see Policy Statement*, 1 FCC 2d at 398, but it never submitted the requisite threshold showing.

[6] In its Reply Brief, citing various pages of the hearing transcript (Tr. 1170, 1199-1206, 1213-1214, 1222-1223, 1237), Pears argues that Robinson's testimony revealed a lack of knowledge and understanding of the operation of the partnership. We have examined those pages and found nothing significant that would undermine Caldwell's representation that Robinson will be actively involved in the management of the station. Pears also cites Robinson's testimony (Tr. 1232-1233) regarding her lack of comments or suggestions about how CCC's legal documentation should be written as support for its contention that Robinson lacked any involvement in structuring CCC and establishing the division of stock ownership. Both Winters and Robinson testified, however, that all three principals, with assistance of counsel, decided the percentage of equity the general partner would have, as well as the allocation of stock within CCC. Tr. 988-989, 1158-1160. Robinson also noted that they agreed among themselves that it would be best if no one person controlled CCC. Tr. 1160; *see* also Tr. 1095. Giles conjures up a theory in its Reply Brief (at 16), however, that the purpose was to assure that Winters and Kenney could outvote Robinson every time. It

is equally true, however, that *Robinson* can align with either of the oth er principals, and outvote the th ird principal every time.

[7] The I.D. so characterizes the record (Tr. 1206-1207, 1211-1212) to support5 a finding that Robinson sought to arrogate credit to herself for coordinating with Caldwell's engineer and checking out the transmitter site. We disagree. The record simply reflects that she contacted the engineer to develop cost estimates, which is not disputed.

[8] Giles charges in its Reply Brief (at 15) that Robinson is already in default. The record, however, establishes no default. She testified that she signs the promissory notes when she begins payment (Tr. 1191), and the record includes a number of the notes she has timely paid off. *See Giles Exhs. 21, 22, 23.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policies and Rules Concerning Children's Television Programming	**MM Docket No. 90-570**
Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations	**MM Docket No. 83-670**

ERRATUM

Released: June 14, 1991

The *Report and Order* in this proceeding (6 FCC Rcd 2111 (1991)) added two new rule sections to 47 CFR Part 73, designated as Sections 73.660. and 73.661. These new sections should have been designated as 47 CFR §§ 73.670 and 73.671 and are now corrected accordingly. Consequently, the reference to Section 73.660 in the last sentence of 47 CFR Section 73.3526(a)(8)(ii), also added in the *Report and Order*, is changed to 47 CFR Section 73.670.

Further information on this revision may be obtained by contacting Rita McDonald. Mass Media Bureau, at (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 4, 1991

Released: June 6, 1991

Leon M. Despres 8900-IB
Despres, Schwartz & Geoghegan
77 W. Washington Street
Suite 711
Chicago, IL 60602-2985

In re: WFMT, Chicago, Illinois
BRH-890801XL

Dear Mr. Despres:

This is in reference to the Petition to Deny that you filed on behalf of Friends of WFMT, Inc. ("Friends") against the license renewal application of Chicago Educational Television Association (CETA) for commercial FM Station WFMT, Chicago, Illinois. Friends alleges that CETA engaged in "broadcast-related misconduct" during the period 1985 through 1989 by attempting to "bleed WFMT of money and strip it of assets." Friends objects primarily to CETA's sale of the publishing rights to WFMT's program guide, and its use of the proceeds of that sale for purposes that allegedly do not benefit WFMT. Friends also objects to CETA's replacement of WFMT management, rumored changes in the station's music and advertising formats, and a WFMT fundraising appeal that Friends considers deceptive.

On December 12, 1990, Friends and CETA reached an agreement settling their differences. Under the relevant terms of the agreement, Friends agreed to withdraw its Petition to Deny and CETA agreed to give Friends input into the selection of four of the ten voting members of CETA's Radio Committee. The function of the Radio Committee is to make policy recommendations concerning WFMT to CETA's governing body, the Board of Trustees. The Radio Committee has no independent policy making authority and Committee members are not paid for their services. On April 11, 1991, the parties filed a joint request asking us to approve the Settlement Agreement and to permit withdrawal of the Petition to Deny. CETA and Friends certify that they did not receive any money or consideration in connection with this arrangement, other than that set forth above.

The agreement between Friends and CETA is a "citizens' agreement" *i.e.*, a contract in which a petitioner to deny agrees to dismiss its petition in exchange for a promise by the licensee to implement a nonfinancial reform. The Commission has taken note of the benefits of citizens' agreements as a vehicle for amicably resolving disputes, but also has recognized the potential for citizens' agreements to disguise extractions of money or other consideration from incumbent licensees in contradiction of established policies. *See First Report and Order, Formulation of Policies and Rules Relating to Broadcast Renewal Applications*, BC Docket No. 81-742, 4 FCC Rcd 4780 (1989), *recon. granted in part and denied in part, Memorandum Opinion and Order*, BC Docket No. 81-742, 5 FCC Rcd 3902 (1990).

As discussed earlier, the citizens' agreement before us calls for Friends' input into the appointment of four members of CETA's Radio Committee. Given that the positions on the Radio Committee are unpaid, purely advisory, and will be filled with parties mutually acceptable to CETA and Friends, we find that the agreement between Friends and CETA is consistent with the public interest and is not a vehicle for a hidden payment or transfer of control. Accordingly, we conclude that the citizens' agreement is acceptable and that the parties have satisfied the "no consideration" requirements governing withdrawal of petitions to deny. *See* 47 C.F.R. § 73.3524. Furthermore, we have reviewed the issues raised in the Petition to Deny, and do not find them to be an impediment to WFMT's license renewal. We note, however, that another organization, the Illinois State Conference of Branches of the NAACP ("NAACP"), also filed a Petition to Deny WFMT's license renewal, raising issues unrelated and distinct from those presented by Friends. We shall defer final action on WFMT's renewal application pending separate review of the NAACP Petition.

Accordingly, the Joint Request for Approval of Settlement Agreement and Withdrawal of Petition to Deny IS GRANTED, the Settlement Agreement between CETA and Friends of WFMT IS APPROVED, and the Friends of WFMT's Petition to Deny the license renewal application for WFMT, Chicago, Illinois IS DISMISSED.

Sincerely,

Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VIRGIN ISLANDS TELEPHONE CORPORATION — AAD 90-19

Request for Declaratory Ruling Concerning the Proper Treatment of Certain Interest Expense Under Parts 32 and 64 of the Commission's Rules.

MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1991; Released: June 14, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 15, 1990, The Virgin Islands Telephone Corporation (VITELCO), in accordance with Section 1.106 of the Commission's Rules, filed a Petition for Reconsideration of a Common Carrier Bureau Order released on October 15, 1990.[1] In the *VITELCO Order*, the Bureau ruled that (1) the interest expense relating to a loan from the Rural Telephone Finance Cooperative (RTFC) to purchase the stock of VITELCO must be included in the computation of federal income taxes (FIT) for the purpose of determining interstate revenue requirements, and (2) VITELCO may not offset the interest received on RTFC Subordinated Capital Certificates against the interest paid on the RTFC loan.

2. In its petition, VITELCO requests that the Bureau reconsider its decision in the *VITELCO Order*, and rule that the interest expense relating to the RTFC loan should not be included in the determination of the interstate FIT for ratemaking purposes. VITELCO also requests that, if the Bureau again determines that the RTFC interest expense must be included in the FIT calculation, the Bureau allow the interest received for the RTFC Subordinated Capital Certificates to be offset against the interest expense. An opposition was filed by the National Exchange Carrier Association, Inc. (NECA). Comments in support of the petition were filed by Hargray Telephone Co. (Hargray); Southeast Nebraska Telephone Co., Inc. (Southeast); RTFC; and VITELCO. For the reasons discussed below, we do not change our decision regarding the accounting treatment of the interest expense relating to the RTFC loan. However, we will allow the interest received on the RTFC Subordinated Capital Certificates to be offset against the interest expense.

II. BACKGROUND

3. In June 1987, the Atlantic Tele-Network Company (ATN) acquired 100% of the stock of VITELCO from ITT Corporation for $94 million. At that time, the book value of VITELCO's stockholders' equity was $52.7 million. ATN initially financed the acquisition of VITELCO with a $94 million bridge loan from E.F. Hutton. On December 30, 1987, ATN obtained a long-term loan of $104.4 million from RTFC. Under the terms of the loan agreement with RTFC, the loan proceeds were to be used to repay the $94 million E.F. Hutton loan and to purchase RTFC Subordinated Capital Certificates in the amount of $10.4 million. The loan agreement with RTFC also required that the loan be secured by a mortgage on VITELCO's assets and that $60 million of the debt to RTFC be recorded on VITELCO's books.

III. POSITIONS OF THE PARTIES

4. In its petition, VITELCO asserts that the RTFC loan was used by ATN to purchase stock of the telephone company, and not to purchase regulated telephone company assets. It also states that the recording of the loan on the books of VITELCO was simply an accommodation to the requirement of the lender for a mortgage on the assets. VITELCO states that the entire RTFC debt on the books of VITELCO is directly traceable either to the repayment of the bridge loan used to acquire the stock in VITELCO or to the purchase of RTFC Certificates.[2]

5. VITELCO makes reference to the Commission's policy pursuant to Part 64 of the Commission's Rules [3] for apportioning costs between regulated and nonregulated activities of telephone companies and their affiliates. VITELCO believes that ATN's purchase of its stock is a nonregulated activity, and that, in accordance with Part 64 and Part 32 of the Commission's Rules, it has properly excluded the debt and the related interest expense from VITELCO's cost of service. VITELCO maintains that the interest expense is directly assignable to ATN and should not be considered for either ratemaking or interstate settlement purposes.[4]

6. Finally, VITELCO claims the Bureau's ruling in this matter has created a double windfall for ratepayers. The first windfall concerns the treatment of the interest expense as a reduction of FIT for settlement purposes. The second windfall is created by the ruling that the interest received from the RTFC Subordinated Capital Certificates may not be offset against the interest expense on the RTFC loan. VITELCO argues that if the Bureau's determination is correct regarding the interest expense on the RTFC loan, the effective cost of the whole loan should be reflected for ratemaking purposes. And, therefore, VITELCO maintains that the interest received on the RTFC Subordinated Capital Certificates should be offset against the interest expense.[5]

7. In its opposing comments, NECA states that VITELCO's arguments are the same as those presented by VITELCO in its Request for Declaratory Ruling, and that there is no new information or rationale that can be addressed by the Bureau.[6] NECA emphasizes that the Bureau's decision to treat the RTFC loan interest expense as a deduction in the calculation of FIT represents an accurate interpretation of the Commission's rules. NECA maintains that VITELCO's characterization of the portion of the RTFC loan and the associated interest that appears on VITELCO's books as an "accommodation" to RTFC is

at best misleading. NECA states that the record shows that VITELCO was required to pledge its assets and record the loan on its books as a condition of the RTFC loan. NECA argues that the fact that ATN's purchase of VITELCO's stock is unregulated does not change the character of the interest expense with respect to VITELCO.[7]

8. Finally, NECA states that VITELCO's claim that the Bureau's ruling creates a windfall for ratepayers is without merit. NECA points out that VITELCO currently incurs substantial interest expense because of the loan recorded on its regulated books. NECA maintains that requiring VITELCO to include the expense in its cost study assures that ratepayers will compensate VITELCO through the NECA revenue pools for no more and no less than its actual tax liability. Consequently, NECA concludes that no windfall occurs.[8]

9. In their support of the petition, Hargray, Southeast, and VITELCO state that the Commission decision in the *VITELCO Order* would severely disadvantage small telephone companies and individual entrepreneurs, both as buyers and sellers of telephone companies. They explain that small companies and individual entrepreneurs are among the most likely candidates to purchase other small telephone companies. They state that these small companies would have to obtain institutional financing for such acquisitions, and would, therefore, be confronted with the lender's need for a mortgage of the telephone company assets to secure the acquisition loan. They maintain that the Commission's ruling would require that the interest expense associated with the acquisition borrowing be included for ratemaking purposes even though not a single telephone company asset was purchased with the financing. They claim that the purchased company would receive less reimbursement from the NECA pool solely by virtue of the acquisition, while other companies in the pool could receive a windfall because the rate of return for the pool could go up to the threshold. By contrast, a purchaser that could make the acquisition with equity financing would not face this interest expense issue. The purchased company could continue to receive the same level of reimbursement as before.[9]

10. RTFC submits comments explaining the nature of its Subordinated Capital Certificates. It explains that the Commission and NECA have erroneously characterized RTFC refunds as income from RTFC Subordinated Capital Certificates and have concluded that such income is nonregulated and, therefore, should not be offset against interest expense. RTFC states that it is a not-for-profit cooperative business operation and that it does not pay interest on its Subordinated Capital Certificates. Rather, it refunds interest it receives from borrowers in excess of its costs. RTFC argues that such amounts are therefore actually a refund of excess interest paid to RTFC and are a proper offset to Part 32, Account 7510, Interest on funded debt.[10]

IV. DISCUSSION

11. We have analyzed VITELCO's petition and carefully considered the comments in support and opposition, and we have concluded that our decision in the VITELCO *Order* regarding the appropriate ratemaking treatment of the interest expense relating to the RTFC loan is correct. The interest expense on VITELCO's books should be treated as a deduction in the calculation of FIT for purposes of interstate access revenue requirements and NECA settlements. However, we have reconsidered our decision regarding the interest received from RTFC, which RTFC has characterized as an interest refund. We have concluded that VITELCO should offset the interest refund against the interest expense on the RTFC loan.

12. VITELCO has not presented any new theory or rationale to convince us that our decision in the *VITELCO Order* regarding the appropriate ratemaking treatment for the interest expense relating to the RTFC loan is wrong. VITELCO's reliance on the Part 64 *Joint Cost* rules is misplaced. The *Joint Cost* rules govern the allocation of joint and common costs recorded on the operating company books between the regulated and nonregulated activities of the operating company.[11] That cost allocation scheme is simply irrelevant to our consideration of VITELCO's request that we impute interest on a debt recorded on operating company books to the holding company. Even if the mortgage of VITELCO's assets was strictly an accommodation to RTFC in order to secure loan financing as VITELCO claims, it still creates a debt of VITELCO. Accordingly, the interest expense relates to financing of VITELCO's regulated plant and should be included in the determination of VITELCO's FIT.

13. VITELCO and its supporters believe that our decision was unfair because a company that was acquired entirely with equity financing, rather than with debt secured by telephone company assets, would not experience the same reduction in its FIT revenue requirement that VITELCO has experienced. Such a case is not before us. We note, however, that the Commission has in the past found a 100% equity capital structure to be inappropriate for a regulated carrier.[12]

14. Nevertheless, we have changed our view regarding the payments relating to the RTFC Subordinated Capital Certificates. RTFC has clarified that its payments are not interest income on RTFC Subordinated Capital Certificates. It has provided adequate evidence that its payments are refunds directly related to the interest charged on the RTFC loan. Therefore, we direct VITELCO to offset the interest refund against the interest expense.

V. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 220, and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, .291, that the Petition for Reconsideration filed November 15, 1990 by Virgin Islands Telephone Corporation, is GRANTED IN PART and DENIED IN PART, as specified above.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Virgin Islands Telephone Corporation Request for Declaratory Ruling Concerning Proper Accounting Treatment for Certain Interest Expense Under Parts 32 and 64 of the Commission's Rules, 5 FCC Rcd 5930 (1990), (hereinafter *VITELCO Order).*

[2] VITELCO Petition at 3-4.

[3] 47 C.F.R. Part 64.

[4] VITELCO Petition at 5-6.

[5] *Id.* at 7-8.

[6] NECA Opposition at 3-4.

[7] *Id.* at 4.

[8] *Id.* at 5.

[9] Hargray Comments in Support at 3; Southeast Comments in Support at 3; and VITELCO Comments in Support at 4-5.

[10] RTFC Comments in Support.

[11] *See generally* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298, *recon.* 2 FCC Rcd 6283 (1987), *further recon.* 3 FCC Rcd 6701 (1988), *aff'd* sub nom. Southwestern Bell Corp. v. FCC, 896 F2d 1378 (D.C. Cir 1990).

[12] Communications Satellite Corporation, Investigation into Charges, Practices, Classifications, Rates and Regulations, 56 FCC 2nd 1101, 1157-1160, (1975) (imputing 45% debt to carrier that had 100% equity capital structure).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WLBE 790, Inc. (WLBE-AM)
Leesburg, Florida

Request for Special Temporary
Authorization to Overcome Cuban
Interference

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1991; Released: June 14, 1991

By the Commission:

1. The Commission has before it for consideration an application for review filed June 4, 1990, on behalf of WLBE 790, Inc. ("WLBE"), licensee of WLBE(AM), Leesburg-Eustis, Florida, pursuant to Section 1.115 of our Rules. WLBE seeks review of the May 3, 1990 action by the Chief, AM Branch, Audio Services Division, Mass Media Bureau, which denied the daytime portion of WLBE's request for a Special Temporary Authorization ("STA") to increase both its daytime and nighttime operating power in order to recover service area lost to interference originating from a co-channel Cuban broadcast station operating with excessive radiation.

2. The Chief, AM Branch, found that WLBE's proposed daytime power increase would result in new prohibited overlap from WLBE's 0.025 mV/m contour to the protected 0.5 mV/m contour of co-channel station WMRZ (formerly WNWS), South Miami, Florida, in contravention of Section 73.37(a) of the Rules. It was also determined that WLBE's loss of primary service due to the Cuban interference did not provide adequate justification to waive the strict "go-no go" overlap protection criteria of Section 73.37(a).[1] Consequently, the daytime portion of the requested power increase was denied.[2]

3. WLBE acknowledges the prohibited overlap but contends that it is not seeking, nor does the situation require, a waiver of any of the Commission's rules. It bases this contention on the fact that it is only requesting an STA on a temporary basis to recover service area lost to Cuban interference rather than a permanent license modification to improve its facility. In substance, WLBE asserts that our AM technical rules are not applicable to requests for relief from Cuban interference.

4. WLBE's assertion is without merit. First, we note that all authorizations issued to permit stations to recover service lost to Cuban interference are temporary. WLBE's proposal is not unique nor is there anything inherent in the concept of temporary authorizations that warrants a blanket dispensation from rules designed to protect the service of other licensees. Second, in our 1984 Report and Order addressing Cuban interference ("Cuban Interference") [3] and implementing regulations mandated by Section 7 of the Radio Broadcasting to Cuba Act,[4] we made clear that proposals seeking facility modifications to overcome Cuban interference must comply with the AM technical rules which afford protection to other stations.[5] In 1986, we revisited the same issue in an unreported opinion involving an application for review of a previous staff action which was similar to the case before us. *See Hernstadt Broadcasting Corporation*, FCC 86-183, released April 21, 1986; *aff'd per curiam sub nom. Howard Broadcasting Corporation v. FCC*, No. 86-1262 (D.C. Cir. September 2, 1987). In *Hernstadt*, we upheld the action of the Mass Media Bureau in applying our technical rules to a request for an STA for relief from Cuban interference. Moreover, we affirmed the Bureau's denial of the request for relief and refusal to waive the rules by explaining that "while recognizing the importance of assisting licensees in coping with signal interference from Cuba, we have emphatically determined that such assistance not issue at the expense of yet another station's signal." *Id.* at para. 7.

5. Since *Hernstadt* was an unreported decision and because there appears to be, as evidenced by the case before us, some misunderstanding concerning this matter, we take this opportunity to emphasize again our determination that the AM technical rules, such as, *in particular*, Section 73.37(a) and the analogous nighttime protection provisions of Section 73.182, will be applied to full effect in judging the acceptability of requests for relief from Cuban interference. We have provided no exemption or relaxation of our basic technical rules for licensees seeking relief from Cuban interference with regard to the protection standards toward other stations.

6. In addition, the fact that WMRZ is receiving Cuban interference will not be considered to reduce the degree of protection which would normally be afforded to that station as determined in the absence of such interference.[6] A contrary approach could result in protected stations receiving new or increased prohibited overlap, excessive radiation, or interference not only from the offending Cuban facility but also from domestic stations at times when the Cuban facility may be operating at reduced power or not operating at all.

7. In this connection, we note that WLBE has not conclusively demonstrated that the duration and intensity of the interfering Cuban signal is such as to render WMRZ's signal unusable during the times and in the area that would be affected by WLBE's application for an STA. While we are unable to directly control a Cuban station's interference, we can prevent domestic stations from further exacerbating the situation by contributing a second undesired signal within the protected service contours of other domestic stations.

8. We also find, consistent with our decision in *Hernstadt*, that loss of service due to Cuban interference does not provide adequate public interest justification for a waiver of our basic technical standards. In addition, since the problem to be resolved arising from such interference is fundamentally an issue of coverage and service, this finding is consistent with other cases in which we have determined that the public interest is not served by waiving the "go-no go" standards of Sections 73.37(a) and the analogous nighttime provisions of 73.182 when the proffered justification is based upon coverage or service related concerns. *See, e.g., ICBC Corp. v. FCC*, 716 F.2d 926 (D.C. Cir. 1983). Moreover, we have reached the same conclusion even when the denial of a waiver and compliance with our technical rules resulted in a station losing much of its service area. *See Audio House, Inc.*, 2 FCC Rcd 3171 (1987).

9. Here, just as in *ICBC* and *Audio House*, the benefit of preserving or enhancing coverage or service to the public versus the public interest in preserving the integrity of our allocations scheme as a whole and affording protection to other stations are the essential factors by which we are guided.[7] In particular, as discussed in paragraphs 6 and 7, *supra*, we do not believe that the public interest is served by allowing one station to modify its facility, even for the purpose of counteracting Cuban interference, when such a modification results in new or additional overlap or potential interference caused to other protected stations.[8]

10. Accordingly, for the reasons set forth herein, IT IS ORDERED that the June 4, 1990, Application for Review filed by WLBE IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In essence, the "go-no go" concept is the embodiment of our policy of determining the acceptability of AM proposals based upon a prohibition against the overlap of certain contours rather than a weighing and balancing of gains and losses in interference. *See Assignment Standards - AM and FM*, 45 FCC 1515 (1964), *recon. denied*, 4 RR 2d 1567 (1967). One of the practical effects of this policy is that we will not accept a proposal's prohibited overlap to another station's protected contour even though the area of proposed new overlap already receives overlap from yet another station.

[2] WLBE's proposed nighttime power increase fully complied with the technical allocation provisions of Section 73.182 (the comparable nighttime analog of the daytime "go-no go" criteria of Section 73.37(a)). As a result, the requested nighttime power increase was granted.

[3] *In the Matter of Compensation for Expenses Incurred in Mitigating the Effects of Cuban Interference to Services Rendered by AM Radio Stations in the United States*, 97 FCC 2d 181 (1984).

[4] Pub. L. No. 98-111, 97 Stat. 749 (Approved Oct. 4, 1983).

[5] "Applications for authorization by the Federal Communications Commission to make changes in authorized station facilities [to overcome Cuban interference] are governed by other applicable provisions of the FCC rules." Section 1.1709(a)(adopted in *Cuban Interference*, 97 FCC 2d 181 (1984)).

"Station licensees are free to seek authorization for facilities changes that will restore service in any areas lost to Cuban interference without in turn interfering with other stations entitled to interference protection." *Id.* at 188.

"It would, moreover, be contrary to Commission policy to grant authorizations for facilities changes that would cause prohibited interference to other stations." *Id.* at 195.

[6] Our position is consistent with and derives from our strict adherence, since its adoption in 1964, to the "go-no go" approach of determining the acceptability of AM proposals. Of equally persuasive significance is the Bureau's long standing policy of excluding from the determination of required protection levels the overlap or interference contributions of certain foreign stations which are operating with excessive radiation or in violation of applicable international broadcast treaties and/or standards.

[7] The roots of our strict adherence to the "go-no go" approach and the strict waiver criteria which we have accorded the rules embodying that approach may also be traced to the fact that our original selection of particular signal strength contours as the normally protected contours was not a determination based solely upon engineering considerations, but also involved a careful consideration of policy questions as well. Consequently, the definition of a particular contour as the normally protected contour means, in effect, that the Commission has already balanced all conflicting goals, such as improvement or preservation of existing service, and has decided to "protect" other stations within the area circumscribed by the "protected" contour. *Assignment Standards-AM and FM*, 45 FCC at 1519-21.

[8] The area of new prohibited overlap which would be caused by WLBE's proposal within the protected WMRZ 0.5 mV/m contour is in excess of 1,800 square miles. Since this incursion involves areas and populations which clearly are not *de minimis* or insignificant and does not result from the anomalous propagation characteristics of a long salt water path, we find WLBE's reliance upon *Teche Broadcasting Corp.*, 30 RR 2d 210 (1974), *Collier Broadcasting Corp.*, 25 FCC 2d 867 (1970), and *Larsen-Irwin Enterprises*, 6 FCC 2d 613 (1967), to be unavailing. Moreover, *C. Alfred Dick*, 57 FCC 2d 1020 (1976) and *Taft Broadcasting Co.*, 2 FCC 2d 584 (1966) are distinguishable since the issue therein was overlap received rather than overlap caused as in the case before us. Similarly, *L&T Enterprises, Inc.*, 45 RR 2d 185 (1979), *La Fiesta Broadcasting Co.*, 45 RR 2d 175 (1979), and *International Radio, Inc.*, 45 RR 2d 173 (1979) are inapposite since none involved a waiver of our "go-no go" technical allocation rules. Finally, *Coastal Broadcasters, Inc.*, 37 FCC 1002 (1964) involved issues of *received* nighttime interference, pre "go-no go" era daytime interference studies, and relatively small amounts of second adjacent channel overlap, none of which are either at issue or pertinent to WLBE's proposal under our present rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN SATELLITE SYSTEMS, INC. File No. W-P-C-1462

For modification of its domestic earth station license to extend program services throughout lower Canada via RCA Satcom satellites from a transmit point in Atlanta, Georgia.

EASTERN MICROWAVE, INC. File No. I-P-C-81-060

For modification of its license to conduct transmissions between the RCA American Communications, Inc. earth station at Hamburg, New Jersey and points in Canada.

EASTERN MICROWAVE, INC. File No. I-P-C-81-060-M

For modification of its license to extend its domestic programming services to points in Canada via the WESTAR V satellite system.

UNITED VIDEO, INC. File No. W-P-C-2501

For modification of its license to extend domestic satellite programming to the Yukon Territory in Canada via RCA Satcom satellites from a transmit point at Chicago, Illinois.

NETLINK USA File No. I-T-C-87-096

For authority under Section 214 of the Communications Act and Section 63.01 of the Commission's Rules to extend existing satellite transmission services to receive points in Canada.

ORDER AND AUTHORIZATION

Adopted: June 7, 1991; Released: June 10, 1991

By the Chief, Common Carrier Bureau:

1. In an order released October 30, 1981, and subsequent orders, the Commission conditionally authorized applications for Southern Satellite Systems, Inc. (Southern), Eastern Microwave, Inc. (Eastern), United Video, Inc. (United), Netlink USA (Netlink) and others for the delivery of transborder video services using U.S. domestic satellites from the U.S. to receive points in Canada.[1] Initially, these applications were conditionally authorized because certain steps necessary for the issuance of a final authorization had not been completed, the most prominent of these steps being the completion of the INTELSAT Article XIV(d) consultation process.

2. While the favorable completion of the INTELSAT Article XIV(d) consultation process normally signals an imminent grant of final authority, the issuance of a grant of final authority for video services is also subject to notification by the State Department as to the adequacy of copyright protection in those countries which would receive U.S. programming. In a letter dated June 28, 1984, the State Department expressed its concern about the inadequate protection for U.S. copyright holders in either Canadian law or regulation.[2] The State Department set forth a general policy that contracts between appropriate parties provide evidence to the Executive Branch that the owners of the programming contained in video origination services have recourse to ensure the protection of their rights. The State Department adopted a similar approach with respect to so-called "special events" or occasional use video programming, by requiring an assurance by legal counsel of a transborder satellite applicant that at the time of the particular transmissions, contractual arrangements will exist which will adequately protect the interests of the copyright holder. [3]

3. Because of the State Department's policy that contractual arrangements form the basis for authorizing the provision of video origination services between the U.S. and Canada, certain services could not receive final authorization. In the case of the above-captioned carriers as well as later applicants seeking authority for the delivery of superstation programming to Canada via domestic satellites, it was highly unlikely that they could negotiate contractual arrangements which would cover all of the copyright holders for programming carried on the so-called superstations. In most cases, the carriers did not know the specific programming carried over the particular superstation they delivered. Morevover, the sheer number of copyright holders involved and the changing nature of the programming made it highly unlikely that the carriers could comply with the State Department's requirement of contractual arrangements prior to final authorization. As a result, authorizations for the delivery of video programming to Canada were limited to not include superstation programming, pending notification from the State Department that adequate copyright protection existed in Canada for superstation programming.

4. By letter dated April 29, 1991, the State Department notified the Commission that the Canadian copyright law took effect on January 1, 1990, and the Canadian Copyright Board (CCB) adopted a royalty rate structure for cable retransmission of network and superstation signals

on October 2, 1990.[4] The State Department further noted that the CCB's decision was reviewed on appeal by the Canadian Cabinet and the CCB's royalty rate structure was left in place. Based on the Canadian Cabinet's decision to uphold the royalty rate structure adopted by the CCB, the State Department recommends that the Commission issue final authorizations for Southern, Eastern and United so that they may provide transmission service to Canada.

5. In light of the State Department's recommendation, we herein grant final authorization for the applications of the above-captioned superstation carriers. Consistent with this action, we also will allow other applicants that received conditional authorizations as part of the Transborder process to provide similarly situated superstation programming to Canada, whether the applicant itself provides the service or provides space segment capacity to a non-common carrier customer.[5] Any limitations regarding superstation programming imposed on their provision of video services to Canada are hereby removed.

6. We grant final authorization to these applicants conditioned on the State Department's continued assurance that U.S. copyright interests are adequately protected by Canada (*e.g.*, just, reasonable and non-discriminatory treatment). If the Executive Branch determines that U.S. interests are not adequately protected, it may wish to consider and inform the Commission of other appropriate action.

7. This authorization involves the delivery of U.S. broadcast signals to Canada only. It does not necessarily represent the views of the U.S. Government with respect to the delivery of similar programming to other non-U.S. locations.

8. Accordingly, IT IS ORDERED, the above-captioned applications of United Video, Eastern Microwave, Southern Satellite Systems, and Netlink USA ARE GRANTED consistent with the terms of this order.[6]

9. IT IS FURTHER ORDERED that applicants who have received conditional authorizations which may include the provision of similarly situated programming ARE GRANTED consistent with the terms of this order and service may be initiated without any further authorization by this Commission.[7]

10. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Transborder Satellite Video Services, 88 FCC 2d 258 (1981); Bonneville Satellite Corporation, *et al.*, Mimeo No. 1554, released December 29, 1983; Overseas Telecommunications, Inc. *et al.*, 2 FCC Rcd 5438 (1987). *See also* 220 Television, File No. 318-DSE-ML-78, Mimeo No. 1125, released November 29, 1985, note 2.

[2] Letter from Ambassador Diana Lady Dougan, United States Coordinator and Director, Bureau of International Communications and Information Policy, Department of State, to Chairman Mark S. Fowler, Federal Communications Commission, June 28, 1984.

[3] Letter from Ambassador Diana Lady Dougan, United States Coordinator and Director, Bureau of International Communications and Information Policy, Department of State, to Chairman Mark S. Fowler, Federal Communications Commission, November 14, 1984.

[4] Letter from Ambassador Bradley P. Holmes, United States Coordinator and Director, Bureau of International Communications and Information Policy, Department of State, to Chairman Alfred Sikes, Federal Communications Commission, April 29, 1991.

[5] Southern, Eastern, United and Netlink are common carriers that retransmit via satellite broadcast signals received "off the air". The signals are then resold to cable television and Home Satellite Dish subscribers. Because these entities retransmit signals on a common carrier basis, a Section 214 authorization is required for the delivery of television signals to non-U.S. points. However, not all program suppliers provide service on a common carrier basis and, consequently, are not licensed as common carriers. In such cases the service may be provided by a non-common carrier entity under a grant of "blanket" Section 214 authority to a satellite system operator which covers all customers on its system. These non-common carrier customers may or may not be licensed to operate a satellite earth station facility under Title III of the Communications Act. In any case, these customers are subject to the same copyright restrictions imposed on the satellite system operator.

[6] This order acknowledges the many operational and regulatory changes that have taken place since the initial grants of conditional authority. Specifically, this order incorporates changes in the use of: 1) satellite systems; and 2) particular satellites within a system consistent with existing INTELSAT Article XIV(d) consultations. This order also recognizes that service may be provided to all of Canada, instead of specific locations as originally requested. *See* International Carrier Policies, 102 FCC 2d 812 (1985); *recon. denied*, 60 R.R. 2d 1435 (1986).

[7] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ARC PROFESSIONAL SERVICES GROUP, INC. File No. CSS-87-017-(LA)

Application for Authority to
Construct, Launch, and Operate
Space Stations in the International
Fixed Satellite Service

ORDER

Adopted: May 31, 1991; Released: June 13, 1991

By the Chief, International Facilities Division:

1. On March 31, 1987, the above-captioned application was filed for authority to construct, launch and operate a C-band satellites stationed at 41^0 W.L. and 171^0 W.L. for the provision of trans-Atlantic and trans-Pacific service, respectively.[1] The subject satellites are part of the Tracking and Data Relay Satellite System (TDRSS) operated by NASA. The purpose of the TDRSS satellites is to relay communications between ground stations in the U.S. and low-orbiting spacecraft, including manned spacecraft, when the spacecraft are over the horizon and not capable of direct communication with U.S. ground stations. TDRSS satellites were developed because the existing worldwide network of ground stations can provide only limited coverage of low orbit spacecraft as they circle the earth and cannot adequately handle the increasingly high rates at which new generations of spacecraft transmit information. Although the TDRSS satellites use Government frequencies in the S-band (2025-2300 MHz) and Ku-band (13,750-15,115 MHz) to provide the tracking and data relay communications service, each of the aforementioned satellites is equipped with twelve transponders which can operate on commercial C-band (4/6 GHz) frequencies. It is the C-band transponders on the TDRSS satellites located at 41^0 and 171^0 W.L. that are the subject of this application.

2. The original applicant, SGC, sought to use the C-band transponders for non-commercial purposes, but its request was not granted. NASA thereafter sought competitive bids for the commercial use of the C-band capacity on the TDRSS satellites located in the Atlantic and Pacific Ocean regions. INTELSAT was initially the successful bidder with respect to the C-band capacity on the TDRSS satellites located at 41^0 and 171^0 W.L. Prior to NASA's award of the TDRSS capacity to INTELSAT, Comsat had filed an application with the Commission to participate in INTELSAT's proposed acquisition of TDRSS C-band capacity as well as other capacity in order to deal with shortages in three ocean regions.[2] However, on January 30, 1990, Columbia, another bidder, was granted injunctive relief against NASA which barred NASA from proceeding to sell exclusive control of the capacity to INTELSAT until NASA referred to the Small Business Administration the question of whether Columbia is a "responsible" customer to purchase capacity pursuant to the Small Business Act. 15 U.S.C.A. §637(b)(7)(A) (West Supp. 1989).[3] Columbia petitioned the Commission to withhold action on Comsat's request to participate in the INTELSAT procurement of TDRSS capacity pending resolution of the administrative remedies ordered by the court. Comsat requested the Commission to hold in abeyance that portion of its application dealing with the TDRSS capacity.[4] In a letter dated May 17, 1990 the Small Business Administration certified that Columbia is "responsible" to perform the lease agreement covering the TDRSS capacity and required NASA to award the contract to Columbia.[5] On June 8, 1990 NASA awarded the contract for C-band capacity on the TDRSS satellites located at 41^0 and 171^0 W.L. to Columbia.

3. Based on NASA's award to Columbia of C-band capacity on the TDRSS satellites located at 41^0 and 171^0 W.L.,[6] the Commission dismissed that portion of Comsat's application regarding acquisition of TDRSS capacity.[7] For the same reasons we also herein dismiss the ARC application.

4. Accordingly, IT IS ORDERED that the application of ARC Professional Services Group, Inc., File No. CSS-87-017(LA) IS DISMISSED.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The application was originally filed by Systematics General Corporation (SGC). By letter dated October 15, 1987 SGC requested to substitute ORI, Inc. as the applicant. The request for substitution resulted from an October 3, 1987 pro forma corporate reorganization of Atlantic Research Corporation, the corporate parent of SGC. ORI, Inc. was subsequently restructured into ARC Professional Services Group, Inc. which was then substituted as the applicant for the instant application.

[2] *See* Comsat's Application File No. CSS-89-004.

[3] *Columbia Communications Corporation v. Truly, et al.*, slip op., Civil Action No. 89-2763 (D.D.C. January 30, 1990).

[4] Letter to the Commission from Keith H. Fagan (Attorney for Comsat), dated March 2, 1990.

[5] Letter dated May 17, 1990 from Robert J. Moffitt, Associate Administrator for Procurement Assistance, U.S. Small Business Administration to Charles T. Force, Associate Administrator for Space Operations, National Aeronautics and Space Administration.

[6] Subsequent to being awarded the TDRSS contract, Columbia, in conjunction with NASA requirements, indicated that it will operate at 174° W.L. Columbia's license request reflects its operation at the 174° W.L. orbital location.

[7] 5 FCC Rcd 5952 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Central Atlantic Payphone Association,
Complainant,

v.

The Bell Telephone Company of Pennsylvania,
Defendant.

File No. E-87-31

ORDER

Adopted June 5, 1991; Released: June 13, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On December 24, 1986, Central Atlantic Payphone Association ("Central") filed a formal complaint against the Bell Telephone Company of Pennsylvania ("PA") alleging that Bell PA's non-sent-paid commission plan for payment of commissions to the premise owners of Bell PA's payphone locations violated provisions of the Communications Act of 1934, as amended ("the Act"). Bell PA filed an answer denying the allegations and a motion to dismiss the complaint on substantive and procedural grounds.

2. On March 21, 1991, Central and Bell PA filed a joint request to dismiss the complaint with prejudice. The parties represent that the practices which gave rise to the complaint no longer exist and are no longer a matter of controversy. Based on the representations of the parties, we conclude that there are no longer issues in controversy and that the proceeding should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Request to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-142

In re Application of

ALGREG CELLULAR ENGINEERING File No. 10607-CL-P-307-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 - Franklin

In re Application of

CRANFORD CELLULAR COMMUNICATIONS File No. 10611-CL-P-311-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 311, Alabama 5 - Cleburne

In re Application of

NEW-ERA CELLULAR TELE-COMMUNICATIONS File No. 10563-CL-P-332-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 332, Arkansas 9- Polk

In re Application of

BAY CELLULAR OF FLORIDA File No. 10754-CL-P-497-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 497 Mississippi 5 - Washington

In re Application of

FLORIDA CELLULAR File No. 10445-CL-P-505-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 505 Missouri 2 - Harrison

In re Application of

A-1 CELLULAR COMMUNICATIONS File No. 10454-CL-P-514-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 514 Missouri 11 - Moniteau

In re Application of

BRAVO CELLULAR File No. 10673-CL-P-579-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 579 North Carolina 15 - Cabarrus

In re Application of

TNT COMMUNICATIONS File No. 10233-CL-P-582-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 582 North Dakota 3 - Barnes

In re Application of

ALPHA CELLULAR File No. 10909-CL-P-586-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 586 Ohio 2 - Sandosky

In re Application of

CEL-TEL COMMUNICATIONS File No. 10912-CL-P-589-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 589 Ohio 5 - Hancock

In re Application of

EJM CELLULAR PARTNERS — File No. 10567-CL-P-596-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 596 Oklahoma 1 - Cimarron

In re Application of

PINELLAS COMMUNICATIONS — File No. 10808-CL-P-613-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 613 Pennsylvania 2 - McKean

In re Application of

CENTAUR PARTNERSHIP — File No. 10720-CL-P-631-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 631 South Carolina 7 - Calhoun

In re Application of

SIGNAL CELLULAR COMMUNICATIONS — File No. 10721-CL-P-632-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 632 South Carolina 8 - Hampton

In re Application of

A-1 CELLULAR COMMUNICATIONS — File No. 10409-CL-P-661-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 661 Texas 10 - Navarro

In re Application of

EJM CELLULAR PARTNERS — File No. 10116-CL-P-721-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721 Wyoming 4 - Niobrara

In re Application of

TNT COMMUNICATIONS — File No. 10678-CL-P-727-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 727 Puerto Rico 5-Ceiba

In re Application of

SATELLITE CELLULAR SYSTEMS — File No. 10037-CL-P-318-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 318 Arizona 1 - Mohave, for station KNKN 268

In re Application of

JAYBAR COMMUNICATIONS — File No. 10042-CL-P-323-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323 Arizona 6 - Graham, for station KNKN 251

In re Applications of

DATA CELLULAR SYSTEMS — File No. 10029-CL-P-345-A-88, File No. 07080-CL-MP-91

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 345 California 10 - Sierra, for station KNKN250

In re Applications of

CELLULAR PACIFIC — File No. 10031-CL-P-346-A-88; File No. 06606-CL-MP-90; File No. 06688-CL-MP-90

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 346 California 11- El Dorado, for station KNKN 252

In re Application of

NORTH AMERICAN CELLULAR — File No. 10066-CL-P-388-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 388 Idaho 1 - Boundary, for station KNKN 253

In re Applications of

ALPHA CELLULAR — File No. 10318-CL-P-410-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410 Indiana 8 - Brown, for station KNKN 340

For assignment of station KNKN340 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 RSA. — File No. 04924-CL-AL-1-90

In re Application of

EDISON CELLULAR — File No. 10262-CL-P-485-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 485 Minnesota 4 - Lake, for station KNKN 281

In re Application of

ALEE CELLULAR COMMUNICATIONS — File No. 10074-CL-P-555-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 555 New Mexico 3 - Catron, for station KNKN 271

In re Application of

CRYSTAL COMMUNICATION SYSTEMS — File No. 10078-CL-P-606-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 606 Oregon 1 - Clatsop, for station KNKN 309

ERRATUM

Released: June 13, 1991

1. The *Memorandum Opinion and Order, Order Designating Applications for Hearing and Order to Show Cause*, DA 91-589, released May 29, 1991, in CC Docket No. 91-142, is hereby corrected as follows:

Caption:

For assignment of station KNKN340 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 RSA. — File No. 04924-CL-AL-1-90

Paragraph 48:

48. IT IS FURTHER ORDERED THAT Applicants Against Lottery Abuses, The Committee for a Fair Lottery, Buckhead Cellular Communications Partnership, Miller Communications, Inc. and Skywave Partners, Inc., Cole Raywid and Braverman, Pepper & Corazzini and the Chief, Common Carrier Bureau, are made parties to this proceeding. The applicants licensees and the parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's rules within 20 days of the mailing of this order by the Secretary. The notice and other expedited procedures of Section 1.822(b) shall not apply in this case.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DANNY'S TWO WAY COMMUNICATIONS, INC.
d/b/a DANN COMM PAGING File No. 24956-CD-P/01-90

For facilities in the Public
Land Mobile Service
at Middletown, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: June 11, 1991; Released: June 14, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Danny's Two Way Communications, Inc. d/b/a Dann Comm Paging (Danny's) filed an application to establish facilities on frequency 152.66 MHz at Middletown, Ohio.[1] USA Mobile Communications, Inc. II (USA Mobile) filed a Petition to Dismiss or Deny (Petition) Danny's application. For the reasons discussed below, we grant USA Mobile's Petition and dismiss Danny's application.

II. DISCUSSION

2. USA Mobile contends that the frequency 152.66 MHz is already licensed to USA Mobile Station KQK592 at Middletown, West Chester, and Dayton, Ohio, and that granting Danny's captioned application would create electrical interference.

3. In opposition, Danny's claims that USA Mobile's authorizations on frequency 152.66 MHz expired by operation of law pursuant to Section 22.303 of the Commission's rules[2] and, thus, USA Mobile cannot contest Danny's application. Danny's refers to two letters addressed to Danny's which were filed with its application: a December 27, 1989 letter from Raymond C. Winters, Chief Engineer at radio station WINK, saying frequency 152.66 MHz had not been used at Cincinnati for over four months, all transmitting equipment had been removed from the premises, and the tower space lease was cancelled; and a May 10, 1990 letter from James P. Gray stating that he monitored frequency 152.66 MHz from January through April 1990, and that he heard no transmissions during that time.

4. In its reply, USA Mobile claims that Danny's allegations are false. USA Mobile asserts that it earlier notified the Commission of its deleting the Cincinnati location following USA Mobile's determination that the transmitter was not needed for coverage for its northern Cincinnati subscribers. Also, USA Mobile states that Mr. Gray advised USA Mobile that he could not verify the reliability or accuracy of the monitoring device provided to him by Danny's. Moreover, USA Mobile appends an affidavit from Joe Truster, USA Mobile's Transmitter Manager for Southern Ohio, indicating that transmissions were monitored on frequency 152.66 MHz at Middletown as well as at West Chester and Dayton throughout January to April, 1990.[3]

5. The question before us is whether USA Mobile's license on frequency 152.66 MHz at Middletown, Ohio has been terminated. In general, a license will terminate for failure to operate the facility only after the Commission takes formal action. The Commission has taken no action terminating USA Mobile's authorization to use frequency 152.66 MHz at Middletown.[4] Accordingly, USA Mobile remains the authorized licensee of frequency 152.66 MHz, and the frequency is not available for reassignment. Consequently, we dismiss Danny's captioned application without prejudice.[5]

III. ORDERING PARAGRAPHS

6. Accordingly, IT IS ORDERED THAT the Petition to Dismiss filed by USA Mobile Communications, Inc. II against the captioned application of Danny's Two Way Communications, Inc. d/b/a Dann Comm Paging, IS GRANTED.

7. IT IS FURTHER ORDERED THAT the captioned application filed by Danny's Two Way Communications, Inc. d/b/a Dann Comm Paging, File No. 24956-CD-P/01-90, IS DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice, Rpt. No. PMS-90-38 (released June 20, 1990).

[2] Section 22.303 provides

> If a station licensed under this part discontinues operation on a permanent basis, the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, any station which has not operated for 90 continuous days is considered to have been permanently discontinued, unless the applicant has notified the Commission otherwise prior to the expiration of the 90 day period and provided a date when operation will resume, which shall not be in excess of 30 additional days.

[3] Danny's subsequently filed a Motion for Leave to Supplement the Record (Motion), claiming material developments subsequent to the pleading cycle raise substantial questions of misrepresentation or lack of candor by USA Mobile. USA Mobile did not oppose the Motion. Danny's filed a reply.

[4] A review of Commission records reveals that USA Mobile's FCC Form 489, filed July 10, 1990, provided notification of its intended deletion of the Cincinnati location.

[5] In view of the allegations of misrepresentation and discontinuance of operation raised by Danny's, we are separately directing USA Mobile to provide additional information.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-337
Phase I

In the Matter of

Regulation of International
Accounting Rates

REPORT AND ORDER

Adopted: May 9, 1991; **Released: May 23, 1991**

By the Commission: Chairman Sikes issuing a separate statement.

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I. INTRODUCTION

1. In this *Report and Order*, we adopt procedural reforms that remove any U.S. regulatory impediments to lower, more economically efficient, cost-based international accounting rates and should expedite international calling price reductions for U.S. consumers. We also recommend that United States delegations to the International Telegraph and Telephone Consultative Committee (CCITT) of the International Telecommunication Union (ITU) seek revision of language in existing and proposed CCITT Recommendations to clarify that international accounting rates should be cost-based and non-discriminatory. Moreover, to ensure that the United States will be in full compliance with international law governing telecommunications, we direct the U.S. carriers to negotiate with their foreign correspondents accounting rates that are consistent with relevant cost trends and that eliminate any non-cost-based differences between accounting rates applied by a foreign correspondent within its region and those applied for the United States, as discussed herein. Finally, in an accompanying *Further Notice of Proposed Rule Making* (*Further Notice*), we propose additional regulatory actions to provide for lower international accounting rates and calling prices for the provision of telecommunications services to and from the United States.

II. BACKGROUND

2. On July 12, 1990, we adopted a *Notice of Proposed Rule Making* (*Notice*) [1] that noted that although the Commission's International Settlements Policy (ISP) had traditionally focused on preventing the "whipsawing" of competing U.S. carriers, the ISP should also address the adverse effect of above-cost levels of international accounting rates on U.S. carriers and U.S. consumers. Moreover, we noted that while the weighted average accounting rate for international common carrier services has remained roughly unchanged, the U.S. net settlements deficit has continued to increase significantly, reaching $2 billion in 1988.[2] Finally, we noted that while U.S. international message telephone service (IMTS) prices appear relatively low in comparison to foreign calling prices to the United States, the existing above-cost international accounting rate structure appears to be the primary reason that U.S. international calling prices are significantly higher than U.S. domestic calling prices.

3. In the *Notice* we made clear our intention to introduce meaningful reform to our ISP in order to promote lower, more economically efficient, cost-based international accounting rates and to promote international calling price reductions on an expedited basis. Indeed, in order to remove U.S. regulatory barriers that would serve as impediments to U.S. carriers negotiating lower international accounting rates, we proposed a three-part reform of our ISP to: (1) permit notification of "simple" accounting rate reductions; [3] (2) expedite regulatory review of ISP waiver requests by establishing definitive waiver criteria; and (3) explore the use of alternative mechanisms, including the use of existing International Telecommunication Regulations (ITU Regulations) and CCITT Recommendations to promote reductions in international accounting rates and calling prices.

III. DISCUSSION

4. In this *Report and Order* we reaffirm our intention to introduce meaningful reform to existing international accounting arrangements and to promote calling price reductions for U.S. consumers. Moreover, while we adopt the two procedural ISP reforms set forth in the *Notice* and thereby remove U.S. regulatory impediments to voluntary, carrier-to-carrier reductions in international accounting rates, we also recognize the importance of multilateral reform efforts by recommending specific changes to existing CCITT Recommendations.

5. In taking these actions, we have been encouraged both by the large number of comments filed[4] in response to the *Notice* and the very substantial support we have received from a variety of commenting parties, including U.S. carriers, for our objective of promoting lower, more economically efficient, cost-based international accounting

rates and calling prices. American Telephone and Telegraph Company (AT&T), for example, asserts that continuation of the present high level of international accounting rates is not in the U.S. public interest because these rates are not cost-based, result in the subsidization of foreign telecommunications enterprises by U.S. consumers, and do not advance the Commission's statutorily mandated goal of affording U.S. citizens efficient worldwide communications services at reasonable rates. MCI also supports international reform, but asserts that it is "imperative" that accounting rate reductions be available to all U.S. carriers providing direct service to the same foreign point. US Sprint agrees and reminds us of the need to recognize the importance of lowering high foreign calling prices.

6. Our objectives are also supported by the National Telecommunications and Information Administration (NTIA),[5] the Department of Defense (DOD),[6] as well as state[7] and local[8] governments and large users.[9] Foreign governments and telecommunications administrations also express interest in international rate reform. The Delegation of the Commission of the European Communities (EC Commission) notes that it is EC Commission policy to achieve more cost-oriented tariffs for telecommunications services generally, and that the EC Commission is currently examining international agreements, under EC competition rules. Kokusai Denshin Denwa Co., Ltd. (KDD), Televerket, the Swedish Telecom Group (Swedish Telecom) and France Telecom[10] also make clear their interest in international reform. Moreover, U.S. carriers negotiated accounting rate reductions with Swedish Telecom,[11] France Telecom,[12] British Telecom and Mercury Communications in the United Kingdom,[13] and Singapore Telecom[14] that represent modest, initial steps toward making international accounting rate reform a reality.

7. A large number of Central[15] and South American[16] countries, and the GTE Telephone Companies (GTE), which owns the local exchange provider in the Dominican Republic, filed comments, however, to emphasize their concern that U.S. accounting rate reductions with net creditor developing countries might deny these countries revenues that might otherwise be put toward telecommunications infrastructure development.[17] In response, Pan American Satellite (PAS) asserts that it is not surprising that the "principal dissenting voices" are foreign telecommunications administrations and that in its view the introduction of competition would lead to an improvement, not a deterioration, of foreign telecommunications infrastructures.[18]

8. We recognize that there may be a difference in philosophy among the commenting parties; however, the procedural reforms we adopt in this *Report and Order* simply remove any existing, or potential, U.S. regulatory impediments to lower, more economically efficient, cost-based international accounting rates as agreed between a U.S. carrier and its foreign correspondent. Moreover, while we also recommend that U.S. delegations to the CCITT seek the addition of language to CCITT D Series Recommendations to clarify that international accounting rates should be cost-based, we do not believe that this is inconsistent in any way with the promotion of telecommunications infrastructure in developed or developing countries. To the contrary, we believe that consumers in both developed and developing countries will benefit from international accounting rate reform, international calling price reductions, and more efficient use of the world's limited telecommunications resources.

A. Notification

9. For our part, we believe that more efficient use of U.S.-based international telecommunications networks will come primarily from continuing efforts to promote competition in the United States and resulting efforts by U.S. carriers to negotiate significant reductions in international accounting rates for service between the United States and other countries. In proposing the introduction of a notification option, however, we noted that under existing ISP waiver procedures, U.S. carriers might have to wait as long as two months for an accounting rate reduction to become effective even though there is no opposition to the proposed modification. Therefore, we proposed a straightforward notification option that would permit a U.S. carrier to implement a simple reduction in an accounting rate by simply filing a letter providing certain information.[19] We made clear, however, that in order to address our traditional concerns with potential whipsawing of competing U.S. carriers, we would require that the U.S. carrier make certain representations concerning return traffic and the non-exclusivity of the lower accounting rate.[20] We also made clear that the notification option would be available for prospective changes only.[21]

10. Based on the support in the record before us, we continue to believe that the notification option should remove any remaining U.S. regulatory barriers to simple reductions in the accounting rates that apply for telecommunications services between the United States and foreign points. We recognize that this may result in non-uniform accounting rates being applied in certain traffic relations for certain services in light of the fact that there may be instances in which the new, lower rate agreed to by one U.S. carrier may not sufficiently cover the costs of a competing carrier should the competing carrier seek to negotiate a similar reduction. TRT/FTC Communications, Inc. (TRT/FTC), for example, suggests that present international telex and packet switched accounting rates in most cases now provide it insufficient revenue to fully recover its international switching and transmission costs and what TRT/FTC argues are the "high, above-cost" domestic network access tariff rates of the U.S. carriers, such as MCI/WUI and Western Union for telex and US Sprint for packet switched service. Indeed, TRT/FTC asserts that the Commission cannot require cost-based accounting rates for telex without also taking steps to reduce U.S. domestic network access rates.

11. While we generally agree with Western Union's response that TRT/FTC is essentially seeking to revisit domestic network access rate issues and thereby reverse an earlier Commission determination to permit carriers "considerable flexibility" in ratemaking,[22] we believe that it is important to note that we are not requiring, as TRT/FTC suggests, U.S. carriers to implement lower international accounting rates that do not cover their costs. Rather, we are simply streamlining our ISP procedures to permit a carrier that wishes to lower its accounting rate to do so. Moreover, while we recognize the concern of both TRT/FTC and US Sprint that the notification option as applied to telex or packet services may result in increased U.S. settlements payments if traffic for a given service on a given route is primarily inbound,[23] we also note Swedish Telecom's statement that "in some instances, the ISP

may be a real or imagined obstacle" to accounting rate reductions.[24] Indeed, by adopting this notification option it is our intent to remove this "real or imagined" obstacle to international rate reform.

12. We also believe that, based on the record before us, we have correctly identified the continuing need to prevent whipsawing of U.S. carriers. In this context, we note that while certain carriers would prefer to delay implementation of an individual accounting rate reduction with a given country until other U.S. carriers have also reached agreement on that rate,[25] others emphasize their preference for making the effective date of the accounting rate reduction specified in their notifications prior to the filing date (retroactive change).[26] We believe that these carriers have missed the point of the notification option. NTIA correctly notes that the importance of adopting the notification option is to send an unequivocal message that U.S. policy is to encourage the implementation of lower, more economically efficient, cost-based international accounting rates.[27] While we recognize that the timing of accounting rate reductions is an important question, we believe that the retroactive application of accounting rate reductions must continue to be the subject of regulatory review in order to ensure that foreign correspondents are not simply extracting concessions from U.S. carriers, perhaps as a result of less favorable than expected financial results for the preceding year or quarter.

13. Indeed, while notifications will not be subject to regulatory review before becoming effective, we wish to make clear to both U.S. carriers and their foreign correspondents that it is our expectation that an accounting rate reduction agreed to by a foreign correspondent will be available to all competing U.S. carriers in a nondiscriminatory fashion. Specifically, it is our expectation that the accounting rate reduction will be available to all competing U.S. carriers as of the effective date provided in the initiating U.S. carrier's notification letter. Moreover, in order to ensure that the effective date of the notified accounting rate is available to all competing U.S. carriers, we will permit a "retroactive" effective date only when a U.S. carrier matches a lower accounting rate notified previously by another carrier.

14. We also wish to make clear that the notification option does not alter longstanding U.S. regulatory policy that U.S. carriers should be afforded nondiscriminatory treatment in their traffic relations with a given country and therefore receive a proportionate share of return traffic. In order to provide reasonable assurance that U.S. carriers will not seek to use the notification option to their competitive advantage, we will require sworn statements, as proposed in the *Notice*, subject to the modifications proposed by US Sprint in its Reply Comments.[28] Specifically, in order to legally implement an accounting rate reduction, we conclude that each notification letter must include a sworn statement that the filing carrier has not bargained for, nor has knowledge of, exclusive availability of the new accounting rate. Similarly, the notification letter must include a sworn statement that the filing carrier has not bargained for, nor has any indication that it will receive, more than its proportionate share of return traffic.[29] We believe that this self-certification approach will permit us to resolve any subsequent difficulties among U.S. carriers through traditional regulatory mechanisms.

15. Nevertheless, we recognize that this approach may not fully address the concerns of some U.S. carriers that they may be subject to "whipsawing" by foreign administrations. As a result, we also wish to make clear that should U.S. carriers identify any additional threat of whipsawing as a result of the implementation of the notification option, we are prepared to consider proposals for additional regulatory action, including the possibility that we might need to scrutinize carefully traffic relations with a given country should significant problems arise or persist.

B. ISP Waiver Requests

16. In proposing revisions to existing ISP waiver procedures, we made clear our intention to expedite regulatory review of other carrier-proposed accounting rate changes by providing definitive guidance to the Common Carrier Bureau for determining whether to grant ISP waiver requests. Under a revised waiver option, we suggested that all carrier-proposed ISP waiver requests be subject to a streamlined 21 day procedure that would permit the Bureau to grant departures from existing uniform accounting rates only if the modification results in a more cost-based international accounting rate[30] and a firm carrier commitment to lower international calling prices.[31]

17. We conclude that we should adopt these proposed modifications to our ISP waiver procedures, subject to certain minor modifications as suggested by NTIA. We believe this action is particularly important in light of the strong support of large users, such as API, for the implementation of our proposed changes and the perceived need to lower international calling prices.

18. A number of carriers question our proposal to rely on a commitment to lower international calling prices, including reductions in calling prices to the United States. We believe that emphasizing our prospective reliance on carrier commitments to calling price reductions sends an unequivocal message that it is not only U.S. policy to encourage voluntary carrier efforts to implement lower, more economically efficient, cost-based, international accounting rates, but also that we have an unequivocal commitment to lower international calling prices.

19. We recognize, however, that some accounting rate modifications may involve proposals for changes in accounting rates for certain time periods or for certain other changes, such as growth-based accounting rates, that may raise competitive or other issues.[32] As a result, while we continue to believe that the Bureau should rely on the two principal factors set forth in the *Notice* in determining whether to grant a given accounting rate modification, we recognize that carriers should be permitted to continue to assert alternative, more general factors, such as the introduction of new or improved services, as justification for granting specific ISP waiver requests.[33] Therefore, we delegate authority to the Common Carrier Bureau to consider, on a case-by-case basis, granting ISP waiver requests that include a lower, more economically efficient, cost-based, international accounting rate when supported by a sound analysis of the benefits that will result from the implementation of that rate.[34] We also wish to clarify, however, that we continue to believe that it will be difficult for carriers to meet the burden of proof in those instances in which there are non-cost based surcharges to an accounting rate, less than a 50 percent share for the originating carrier, or a U.S. carrier paying more than a 50 percent share of the costs for, or accounting rate of,

transit arrangements.[35] We also wish to clarify that we will expect the Bureau to examine carefully requests for waiver of the ISP that do not contain carrier commitments to lower international calling prices, but instead rely on more general public interest factors.

20. Finally, in order to address traditional concerns about the potential whipsawing of U.S. carriers, we will require carriers to submit the same sworn statements concerning nonexclusivity and proportionate return traffic that we have established as part of the notification option. Moreover, all carriers must serve a copy of their ISP waiver request on all carriers providing the same or similar service to the foreign administration identified in the filing on the same day they file the original with the Commission. We wish to emphasize again to both U.S. carriers and their foreign correspondents that it is our expectation that an accounting rate modification agreed to by a given foreign correspondent will be available to all competing U.S. carriers in a nondiscriminatory fashion.[36]

C. International Reform

21. While we believe that these procedural reforms remove U.S. regulatory impediments to lower, more economically efficient, cost-based international accounting rates and may help result in lower international calling prices, we believe that additional international reform is necessary. Indeed, in the *Notice*, we made clear our view that there are cost and pricing issues associated with the reform of international accounting and collection rates that cannot be addressed by U.S. ISP procedural reforms alone. As a result, we tentatively concluded that we should explore the use of alternative mechanisms, including the ITU Regulations and CCITT Recommendations, to promote cost-based international accounting rates and reductions in calling prices to and from the United States.

22. In this *Report and Order* we affirm our tentative conclusion to explore the use of the ITU Regulations and CCITT Recommendations to promote reductions in international accounting rates. We agree with API and a number of other commenters that the ITU Regulations and CCITT Recommendations, which are based on a worldwide consensus on broad principles, provide a baseline acceptance that can have a significant impact in the international telecommunications environment. Moreover, Article 6.2.1 clearly states that administrations or recognized private operating agencies shall take relevant cost trends into account in establishing and revising accounting rates.[37] Furthermore, Article 1 (f) of the ITU Constitution provides that the purpose of the ITU is to foster collaboration among Members with a view to establishment of rates at levels as low as possible.[38]

23. We agree with NTIA that CCITT Study Group III, which is involved in significant work on accounting and charging principles, provides a forum that should be useful in providing specific opportunities for U.S. advocacy of the principle of cost-based international accounting and collection rates. In particular, we have been encouraged by the efforts of the Chairman of CCITT Study Group III, who has suggested that there is "insufficient flexibility" and a lack of recognized standards for international accounting rates, and has requested that this issue be addressed by Member countries on an urgent basis.[39] Indeed, we believe that it is imperative that the United States respond to this request for written submissions. Specifically, we believe that a written U.S. submission should be made to the relevant working party or parties of Study Group III clarifying two fundamental points. First, the U.S. submission should make clear that international telecommunications administrations should take the cost of providing a given service into account when establishing or revising accounting rates to be applied in a given relation. Second, the U.S. submission should make clear that administrations should seek to eliminate any non-cost-based differences between accounting rates to be applied for countries within its region and those applied for countries outside its region. Simply put, the international telecommunications community should permit advances in telecommunications technology, and in particular dramatic reductions in transmissions costs, to support and encourage efforts to integrate the global economy rather than to retain the artificially high international accounting and collection rates that serve as barriers to keep nations and their people apart. We recognize, however, that a written U.S. submission must be fully coordinated within the United States, and we look forward to working with the Department of State, NTIA, other Executive Branch agencies, U.S. carriers, U.S. users and others in finalizing a U.S. contribution to CCITT Study Group III.[40]

24. To ensure that the United States continues to fully support the primary purpose of the ITU, we direct U.S. carriers to negotiate with their foreign correspondents accounting rates that are consistent with relevant cost trends and that eliminate any non-cost-based differences between accounting rates applied by foreign administrations within its own region and those applied for the United States. We are particularly concerned with evidence in the record which suggests that U.S. carriers may be making overpayments of as much as $500 million per year to two regions of the world, Asia[41] and Europe,[42] that include a number of countries that have advanced telecommunications networks.[43] We believe, for example, based on the information now before us, that U.S. carriers should be paying approximately half current rates, or at most between 0.275 SDRs to 0.42 SDRs ($0.39 - $0.60) to terminate U.S. telephone calls in Asia[44] and between 0.165 SDRs to 0.275 SDRs ($0.23 -$0.39) per minute to terminate U.S. telephone calls in Europe.[45]

25. We recognize that reliable cost information is difficult to obtain and we therefore cannot state, with certainty, that these estimates provide a definitive basis on which to make our policy judgments. However, we believe that these benchmark estimates are both reasonable and conservative.[46] In the case of Asia, for example, while we welcome the suggestion of KDD that it may be prepared to share cost information with us to justify what KDD believes are higher business costs in Japan,[47] we continue to have questions why it would be several times more expensive to terminate telephone traffic in Japan.[48] Indeed, the dramatic technological improvements in telecommunications facilities that have occurred in the last several years, particularly in underseas fiber-optic cables, should prove to be of particular benefit in reducing transmission costs between the United States and the Asia region.

26. We are particularly concerned that the present level of certain intra-regional accounting rates or other country-to-country arrangements suggest that U.S. carriers may not only be required to pay above-cost accounting rates, but that U.S. carriers are subject to discriminatory treatment in this respect.[49] In the case of Europe, for example, U.S. carriers may be paying as much as $0.50 to $1.40 per

minute more to terminate U.S.-originated telephone calls than other countries pay to terminate their international telephone calls in those same locations.[50] Indeed, while we recognize that actual intra-European accounting rates are generally not published, no party has challenged the information that AT&T submitted that existing intra-European accounting rates range from a low of 0.33 SDRs ($0.47) per minute to a high of 0.55 SDRs ($0.78) per minute.[51] Moreover, absent new bilateral agreements with U.S. carriers, this discriminatory treatment is likely to grow. In October 1990, for example, the Tariff Group for Europe and the Mediterranean Basin (the TEUREM Group) agreed that intra-European accounting rates should be reduced by as much as 35 percent beginning in 1993[52] and by as much as 50 percent by 1996.[53]

27. Our analysis above therefore suggests that foreign carriers in the Asia and Europe regions may be maintaining accounting rates with the United States that either ignore relevant cost trends or are discriminating against the U.S. carriers, contrary to the primary purpose of the ITU to maintain and extend international cooperation between all ITU Members for the improvement and rational use of telecommunications.[54] Therefore, while we direct U.S. carriers to negotiate reductions in accounting rates with the goal of ensuring that all U.S. international accounting rates are consistent with international law governing international telecommunications, we recognize, as a practical matter, that it may be appropriate for U.S. carriers to focus their initial efforts. In this respect, we believe that U.S. carriers should give highest priority in their initial efforts to the most egregious cases in the Asia and Europe regions where a country either maintains an accounting rate that ignores relevant cost trends, looking to the benchmark estimates we set forth above, or where a foreign correspondent maintains non-cost-based differences between accounting rates applied within its region and those applied for the United States. In an accompanying *Further Notice*, we ask for further information on the appropriate benchmarks and the need to balance developing a "Nation-wide and world-wide wire and radio communication service with adequate facilities" and doing so "at reasonable charges."[55] We also invite comment in the *Further Notice* on what, if any, further regulatory actions the Commission should propose should U.S. carriers be unable to negotiate lower, more economically efficient, cost-based accounting rates.

IV. CONCLUSION

28. In this *Report and Order* we have adopted procedural reforms that remove any real, or perceived, U.S. regulatory impediments to lower, more cost-based, international accounting rates. We also recommend that U.S. delegations prepare a U.S. contribution to CCITT Study Group III that seeks to clarify that international accounting rates should be cost-based. Moreover, to ensure that the United States will be in full compliance with international law governing telecommunications, we direct the U.S. carriers to negotiate with their foreign correspondents accounting rates that are consistent with relevant cost trends and that eliminate any non-cost-based differences between accounting rates applied by foreign correspondents within its region and those applied for the United States. We welcome and appreciate the support that has been offered for our efforts thus far and believe that our actions in this *Report and Order* send the unequivocal message that our policy is to encourage cost-based international accounting rates and reductions in international calling prices.

V. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4, 201-205, 211, 215, 218-220, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, 211, 215, 218-220, and 303, Parts 43 and 64 of the Commission's Rules, 47 C.F.R. Parts 43 and 64 ARE AMENDED as set forth in Appendix B below.

30. IT IS FURTHER ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

31. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau is delegated authority to act upon matters pertaining to the policies, rules and requirements set forth herein.

32. IT IS FURTHER ORDERED that NTIA's request that the Commission accept its October 15, 1990 comments under this docket is GRANTED.

33. IT IS FURTHER ORDERED that NARUC's request that the Commission accept its January 8, 1991 comments under this docket is GRANTED.

34. IT IS FURTHER ORDERED that this *Report and Order* will be effective July 15, 1991.

35. For further information on this item contact Michael Mandigo Attorney/Advisor, International Policy Division, Common Carrier Bureau, (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Regulation of International Accounting Rates, 5 FCC Rcd 4948 (1990).

[2] The *Notice* observed that this settlements deficit was a result of several factors, including above-cost international accounting rates and high foreign calling prices to the United States, and provided appendices listing U.S. net settlements deficits, accounting rates and comparative calling prices with certain countries. *Id.*

[3] The *Notice* observed that we would define a simple reduction as a reduction involving a mathematical reduction in the accounting rate and no other change to the operating agreement between the carriers. This would involve, for example, a simple reduction from 1.2 to 0.6 Special Drawing Rights (SDRs), or from $1.00 to $0.50 per minute. This would not include, however, a modification of the accounting rate that would include a shift of the exchange rate risk (for example, a change from $1.00 to 0.6 SDRs) or the introduction of other changes, such as new accounting rate structures (peak/offpeak or "growth-based rates"). *See Notice* at n. 34. An SDR is a basket of currencies established by the International Monetary Fund. In December, 1990, an SDR was worth approximately $1.42. International Monetary Fund, *International Financial Statistics;* Economic Report of the President, Table B-106 (February 1991).

[4] 30 parties filed comments. For an alphabetical list of commenters see Appendix A.

[5] NTIA supports the "broad thrust" of our proposals and stresses the need for liberalization of restrictive foreign markets. NTIA Comments at 4.

[6] DOD "applauds" our efforts and states that telecommunications rates should be based on costs and not be distorted by extraneous factors. DOD Comments at 2.

[7] State of Hawaii Comments and the Michigan Public Service Commission staff Comments. On January 8, 1991, the National Association of Regulatory Utility Commissioners (NARUC) filed a request to accept late-filed comments. We hereby grant that request.

[8] *See* the City of New York Comments.

[9] The American Petroleum Institute (API) refers to the *Notice* as a "positive step" that signals an "intolerance with the status quo" that is shared by the user community. API Comments at 2.

[10] France Telecom also lists the progress it has made, but indicates further that in France, rebalancing of domestic and international tariffs can only be achieved in several steps as such rebalancing remains under French government control. France Telecom Comments at 1.

[11] Swedish Telecom has introduced a U.S.-Sweden IMTS accounting rate of 0.50 SDR ($0.71) per minute. *See* File Nos. USP-91-(N)-030, 039, 042, 047, and 054.

[12] France Telecom has reduced the U.S.-France IMTS accounting rate per minute to 1.0 SDR ($1.42) per minute full period (full) and 0.80 SDR ($1.14) per minute reduced period (reduced). *See* File Nos. USP-91-(N)-041, 053, and 086.

[13] The reduction with British Telecom involves a gradual reduction in the accounting rate from $1.06 per minute full period (full) and $0.76 per minute reduced period (reduced), to 0.68 SDR full ($0.97) and 0.48 reduced ($0.68), effective April 1, 1991; to 0.54 SDR full ($0.77) and 0.38 SDR reduced ($0.54), effective April 1, 1992; and to 0.44 SDR full ($0.62) and 0.35 reduced ($0.50), effective April 1, 1993. *See* File Nos. USP-91-(N)-001, 004, and 094.

The reduction with Mercury Communications involves a gradual reduction in the accounting rate from $1.06 full and $0.76 reduced, to $0.76 per minute for all time periods, effective January 1, 1991; to 0.53 SDR ($0.75) for all time periods, effective April 1, 1991; to 0.50 SDR ($0.71) for all time periods, effective January 1, 1992; and to 0.40 SDR ($0.57) for all time periods, effective January 1, 1993 -- the last of which is subject to review of cost levels during 1992. *See* File Nos. USP-91-(N)-005, 057, 060, and 073.

[14] Singapore Telecom has introduced a U.S.-Singapore IMTS accounting rate of 0.68 SDR ($0.97) per minute.

[15] The Central American Regional Technical Telecommunications Commission (COMTELCA) states that the medium and near-term development of their administration's infrastructure depends significantly on international settlements and that the improvement and extension of their networks improves service for U.S. consumers. COMTELCA Comments at 1-2.

[16] The Hispano American Association of Research Centers and Telecommunications Companies (ACHIET), representing 35 carriers from 20 Hispano American countries, asserts that the ITU Regulations require mutual agreement on accounting rates and that it is important that we consider additional factors, such as economic and cultural differences among developed and developing countries. ACHIET Comments at 2-3.

[17] GTE also asserts that the analysis in the *Notice* involves "broad guesses" about the foreign costs of production, fails to address the "underlying" causes of the persistent net outflow of telephone calls, and omits the reduction in the value of the dollar relative to the SDR from 1985 to 1988.

[18] PAS Reply Comments at 2. TRICOM notes that even where subsidies to developing countries once may have been appropriate, cost-based telephone service and new technology in privatizing less developed countries' telephone networks will generate a greater flow of profits and investment capital to support expansion of national networks. Reply Comments of Telepuerto San Isidro, S.A. d/b/a TRICOM (TRICOM) at 4-5.

[19] Specifically, we proposed that the letter should state: (1) the applicable international service (IMTS, telex, telegraph, or packet switched data); (2) the foreign telecommunications administration; (3) the present accounting rate; (4) the new accounting rate; (5) the effective date (6) that the accounting rate will be divided 50-50; and (7) that there has been no other change in the operating agreement with the foreign correspondent.

[20] Moreover, we proposed that carriers taking advantage of the notification option would also be required to serve a copy of the notification letter on all other carriers providing the same or similar service to and from the country specified in the notification. *Id.* at n. 37.

[21] The *Notice* proposed permitting a retroactive effective date only for additional U.S. carriers that wish to implement a lower accounting rate already implemented by another U.S. carrier and only as far back as the initial implementation date as set forth in the initial carrier's notification letter to the Commission.

[22] Western Union Reply Comments at 2-3, *citing* CC Docket 78-97, 95 FCC 2d 881.

[23] TRT/FTC Comments at 3, US Sprint Comments at 8.

[24] Swedish Telecom Comments at 5.

[25] *See, e.g.*, MCI Comments at 8, US Sprint Comments at 9.

[26] AT&T Comments at 20.

[27] NTIA Comments at 13-14.

[28] US Sprint Reply Comments at 9, n. 3.

[29] Moreover, if a carrier files a notification letter that should be filed as an ISP waiver request, *see* discussion *infra*, the Common Carrier Bureau will return the notification letter to the carrier. In this context, the carrier must file an ISP waiver request before it can legally implement the proposed modification.

[30] In this context, we noted that under our waiver option we would expect to deny certain types of waiver requests, such as non-cost-based increases in, or surcharges to, the accounting rate, or less than 50 percent shares for U.S. carriers, including, for example, U.S. carriers paying out more than 50 percent shares of the accounting rate for transit arrangements. *Notice* at 4950.

[31] The *Notice* also noted that under the proposed waiver request procedure carriers would be required to make representations concerning the non-exclusivity of their arrangements and adherence to traditional principles of return traffic. *Id.* at n. 41.

[32] In this respect, we agree with MCI that all filings, whether through notification letter or ISP waiver request, must identify all components of an accounting rate, including surcharges, peak/off-peak or minimum/non-minimum arrangements, and the modifications thereto. *See* MCI Comments at 9.

[33] NTIA comments at 11.

[34] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[35] We will also continue to permit, as MCI suggests, transit arrangements that are consistent with CCITT Recommendations and the U.S. public interest.

[36] This would include, of course, the expectation that the effective date of the accounting rate change, whether prospective or retroactive, will be available to competing U.S. carriers.

[37] *See* Article 6.2.1, The International Telecommunication Regulations, Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, Australia (November 28 to December 9, 1988).

[38] Constitution of the International Telecommunication Union, Purposes of the Union (*ITU Constitution)*, Article 1.2(f).

[39] Chairman of CCITT Study Group III, Discussion Paper on Accounting Principles and Mechanisms for International Telecommunication Services, Contribution 75 (December 1990).

[40] We agree with NTIA that it is also important to use other multilateral forums to promote international accounting and collection rate reform. Indeed, certain forums, particularly the Organization for Economic Co-operation and Development (OECD), may provide complementary venues for U.S. advocacy of reductions in international accounting and collection rates. As a result, we also look forward to working with the Department of State, NTIA, DOD, and other U.S. government agencies, as well as the U.S. private sector to ensure effective U.S. advocacy on these issues in these forums.

[41] In Appendix C we list CCITT countries we have considered in our initial analysis of the Asia region. This list was derived from the "General Plan for the Development of the Interregional Telecommunication Network," CCITT-CCIR (1988).

[42] In Appendix D we list the countries we considered in our initial analysis of the Europe region. This list was derived from the "General Plan for the Devlopment of the Interregional Telecommunication Network," CCITT-CCIR (1988).

[43] We recognize that both Asia and Europe include countries with diverse characteristics in terms of geography, national income, economic development, demand for telecommunications services, and development of national networks. We recognize, for example, that certain countries in the Asia region, such as Australia, Hong Kong, Japan, New Zealand, Singapore, South Korea and Taiwan, may have lower costs than other Asian countries. Similarly, we recognize that the cost of providing telecommunications services in the European Community (EC) or European Free Trade Association (EFTA) countries may be lower than non-EC or non-EFTA European countries. European Community countries are: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, and the United Kingdom. European Free Trade Association countries are: Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

[44] These estimates are in the range of current U.S. IMTS accounting rate with Australia and Singapore. The U.S.-Australia IMTS accounting rate is 0.80 SDRs ($1.14). The U.S. IMTS accounting rate with Singapore is 0.68 SDRs ($0.97). Moreover, the estimates we provide for Asia are slightly higher than the estimates for Europe in order to address any additional costs associated with providing telephone service to the Asia region.

[45] These estimates are in the range of recently agreed U.S.-Europe intercontinental accounting rates with Sweden and the United Kingdom. The U.S.-Sweden IMTS accounting rate is 0.50 SDRs ($0.71) per minute. British Telecom and Mercury have agreed to a reduction of U.S.-U.K. IMTS accounting rates to between 0.40 and 0.45 SDRs ($0.57 - $0.64) per minute by early 1993. *See* File Nos. USP-91-(N)-001,004, 005, 057, 060, 073, and 094.

[46] Although we do not have reliable cost information or cost surrogates for Latin America and Africa, we believe that we should seek to develop estimates that would serve as a basis for U.S. carrier discussions with countries in these regions. We seek comment on what levels would be appropriate for these regions in an accompanying *Further Notice*. *See* "General Plan for the Develpment of the Interregional Telecommunication Network," CCITT-CCIR (1988), for a list of the CCITT countries in these regions.

[47] KDD states that its calling prices to the United States approximate, or are lower than, U.S. calling prices to Japan and that it will soon begin making settlement payments to U.S. carriers. As a result, we look forward to what we hope will be significant voluntary reductions to the current U.S.-Japan IMTS accounting rate as cost-based accounting rates accrue to Japan's national interest.

[48] The existing U.S.-Japan IMTS accounting rate of 1.34 SDRs ($1.90) is, for example, more than two and one-half times the U.S.-Sweden IMTS accounting rate. Similarly, the U.S.-Canada IMTS accounting rate of 28 cents per minute (full period) is equal to approximately 0.2 SDRS at existing exchange rates. This is approximately one-sixth the U.S.-Japan IMTS accounting rate. Indeed, perhaps even more telling are the existing U.S.-Singapore and U.S.-Australia IMTS accounting rates, *see supra* note 44.

[49] We note, for example, that Teleglobe (Canada's international carrier) has suggested that "[o]n average, Teleglobe's accounting rates compare quite favorably with those of AT&T." Peter A. Stern, Teleglobe Canada, Inc., The International Telecommunications Settlements Process: What's Needed? Destroy and Replace It or Adjust It? International Institute of Communications Telecommunications Forum, Washington, D.C. (October 1990).

[50] AT&T Comments at Appendix A.

[51] *Id.*

[52] Tariff Group for Europe and the Mediterranean Basin, Report TEUREM-R 2 (November 1990). TEUREM Group countries are listed in Appendix E. In March 1991 CCITT Study Group III unanimously agreed to submit a revised version of the TEUREM Group's revised CCITT Recommendation D.300R for accelerated approval.

[53] The Netherlands, supported by several other European countries, has even argued that the revised intra-European accounting rates submitted by the TEUREM Group are "still far above the expected costs" of providing international telephone service. In its statement to CCITT Study Group III, the Netherlands noted that lower accounting rates would have resulted from the TEUREM study if: (1) the cost methodology used had been based on the costs of digital transmission and switching only; (2) figures regarding the degree of digitalization had been verified; (3) sufficient attention had been paid to cost reductions resulting from new technologies, higher bit-streams and efficiency improvements for personnel; (4) exchange rate fluctuations for certain countries had been considered; and (5) further cost reductions that will result from the introduction of new technologies, including the introduction of new transatlantic cables, had been considered. *See* Statement by the Netherlands Delegation, Annex 5, Temporary Document 13, CCITT Secretariat (March 14, 1991).

[54] *ITU Constitution*, Article 1.1(a).

[55] 47 U.S.C. § 151.

APPENDIX A

COMMENTS:

1. Hispano American Association of Research Centers and Telecommunications Companies (ACHIET)
2. American Telephone and Telegraph Co. (AT&T)
3. American Petroleum Institute (API)
4. Brazil
5. Entel Chile
6. Republic of Colombia
7. Competitive Telecommunications Association (CompTel)
8. Telecommunications Regional Technical Association of Central America (COMTELCA)
9. Department of Defense (DoD)
10. Commission of the European Communities (EC)
11. France Telecom
12. Fred Goll
13. GTE Telephone Companies (GTE)
14. State of Hawaii (Hawaii)
15. Intercommunications Corporation (Intercommunications) and Trans/Comm Corporation (Trans/Comm)
16. MCI Telecommunications Corporation (MCI)
17. Michigan Public Service Commission Staff (Michigan)
18. National Association of Regulatory Utility Commissioners (NARUC)
19. National Telecommunications and Information Administration (NTIA)
20. New York City Department of Telecommunications (City of New York)
21. Royal Norwegian Embassy
22. NTS Communications, Inc. (NTS)
23. Pan American Satellite Corporation (PAS)
24. TRT/FTC Communications, Inc. (FTC/TRT)
25. US Sprint Communications Company, Limited Partnership (US Sprint)

REPLY COMMENTS

1. AT&T
2. Communications Satellite Corporation (COMSAT)
3. GTE Telephone Companies
4. Kokusai Denshin Denwa Co., Ltd, (KDD)
5. MCI
6. NTIA
7. NTS
8. PAS
9. Televerket (Swedish Telecom Group)
10. Telepuerto San Isidro, S.A. d/b/a/ TRICOM (TRICOM)
11. TRT/FTC
12. US Sprint
13. Western Union Corporation (Western Union)

APPENDIX B

A. Title 47 of the Code of Federal Regulations, Part 47, is amended as follows:

1. The authority citation for Part 43 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.

2. Section 43.51(a) IS REVISED to read as follows:

(a) Any communications common carrier engaged in domestic or foreign communications, or both, which has not been classified as non-dominant pursuant to § 61.3 of the Commission's Rules, 47 CFR § 61.3, is not treated under the regulatory forbearance policies established by the Commission, and which enters into a contract with another carrier, including an operating agreement with a communications entity in a foreign point for the provision of a common-carrier service between the United States and that point, must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto with respect to the following: (1) the exchange of services; (2) except as provided in paragraph (c) of this section, the interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances; and (3) the rights granted to the carrier by any foreign government for the landing, connection, installation, or operation of cables, land lines, radio stations, offices, or for otherwise engaging in communication operation.

3. Section 43.51 IS AMENDED by adding the following new subsection:

(d) International Settlements Policy. (1) If a carrier files an operating agreement (whether in the form of a contract, concession, license, etc.) referred to in Section 43.51(a) to begin providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point and the terms and conditions of such agreement relating to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances, are not identical to the equivalent terms and conditions in the operating agreement of another carrier providing the same or similar service between the United States and the same foreign point, the carrier must also file with the Common Carrier Bureau a notification letter or waiver request, as appropriate, under section 64.1001 of the these rules.

(2) If a carrier files an amendment to the operating agreement referred to in section 43.51(a) under which it already provides switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, and other carriers provide the same or similar service to the same foreign point, and the amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances, the carrier must also file with the Common Carrier Bureau a notification letter or waiver request, as appropriate, under section 64.1001 of these rules.

B. Title 47 of the Code of Federal Regulations, Part 64, is amended as follows:

1. The authority citation for Part 64, Supart J, IS ADDED as follows:

Authority: Secs. 4, 201-205, 211, 218-220, 303, 48 Stat. 1066, 1070, 1072-73, 1077-78, as amended, 47 U.S.C. 154, 201-205, 211, 218-220, 303.

2. Subpart J of Part 64 IS ADDED as follows:

Subpart J -- International Settlements Policy and Waivers

§64.1001 International Settlements Policy and Waivers

(a) The procedures set forth in this rule are subject to Commission policies on international operating agreements in CC Dkt. No. 90-337.

(b) If the accounting rate referred to in section 43.51(d)(1) is lower than the accounting rate in effect in the operating agreement of another carrier providing service to or from the same foreign point, and there is no modification in the other terms and conditions referred to in section 43.51(d)(1), the carrier must file a notification letter under subsection (e).

(c) If the amendment referred to in section 43.51(d)(2) is a simple reduction in the accounting rate, and there is no modification in the other terms and conditions referred to in section 43.51(d)(2), the carrier must file a notification letter under subsection (e).

(d) If the operating agreement or amendment referred to in sections 43.51(d)(1) and (d)(2) is not subject to notification under subsections (b) and (c) above, the carrier must file a waiver request under subsection (f).

(e) A notification letter must contain the following information: (1) the applicable international service; (2) the name of the foreign telecommunications administration; (3) the present accounting rate (including any surcharges); (4) the new accounting rate (including any

surcharges); (5) the effective date (see subparagraph (h)); (6) a statement that the accounting rate will be divided 50-50; and (7) a statement that there has been no other modification in the operating agreement with the foreign correspondent regarding the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, or the basis of settlement of traffic balances.

(f) A waiver request must contain the following information: (1) the applicable international service; (2) the name of the foreign telecommunications administration; (3) the present accounting rate (including any surcharges); (4) the new accounting rate (including any surcharges); (5) the effective date; (6) the division of the accounting rate; (7) an explanation of the proposed modification(s) in the operating agreement with the foreign correspondent.

(g) Notification letters and waiver requests must contain notarized statements that the filing carrier (1) has not bargained for, nor has knowledge of, exclusive availability of the new accounting rate; and (2) has not bargained for, nor has any indication that it will receive, more than its proportionate share of return traffic.

(h) The operating agreement or amendment subject to a notification letter is effective on the date the carrier files the notification letter; provided that the notification letter specifies an effective date for the modification that is later than the filing date; provided further that, if the purpose of the amendment is to match an accounting rate reduction specified in a notification letter previously filed by another carrier for the same point, the filing carrier may specify in the amendment and notification letter a retroactive effective date identical to that on which the previously-filed reduction became effective.

(i) If a carrier files a notification letter for an operating agreement or amendment that should have been filed as a waiver request, the Bureau will return the notification letter to the filing carrier and the Bureau will notify the carrier that, before it can implement the proposed modification, it must file a waiver request under subsection (f).

(j) An operating agreement or amendment filed under a waiver request cannot become effective until the waiver has been granted under subparagraph (l) of this section.

(k) On the same day the notification letter or waiver request is filed, carriers must serve a copy of the notification letter or waiver request on all carriers providing the same or similar service to the foreign administration identified in the filing.

(1) All waiver requests will be subject to a twenty-one (21) day pleading period for objections or comments, commencing the date after the request is filed. If the waiver request is not complete when filed, the carrier will be notified that additional information is to be submitted, and a new 21 day pleading period will begin when the additional information is filed. The waiver will be deemed granted as of the twenty-second (22nd) day without any formal staff action being taken; provided (1) no objections have been filed, and (2) the Common Carrier Bureau has not notified the carrier that grant of the waiver may not serve the public interest and that implementation of the proposed modification must await formal staff action on the waiver request. If objections or comments are filed, the carrier requesting the waiver may file a response pursuant to section 1.45 of the Commission's rules, 47 C.F.R. § 1.45. Waiver requests that are formally opposed must await formal action by the Common Carrier Bureau before the proposed modification can be implemented.

APPENDIX C

Countries that form the Asia Region

(derived from "General Plan for the Development of the Interregional Telecommunication Network," CCITT-CCIR (1988))

Afghanistan
Australia
Bangladesh
Bahrain
Burma
Brunei
China
Cook Islands
Fiji
French Polynesia
Hong Kong
India
Indonesia
Iran
Iraq
Israel
Japan
Jordan
Kampuchea
Kiribati
Korea
People's Republic of Korea
Kuwait
People's Democratic Republic of Lao
Lebanon
Macao
Malaysia
Maldives
Mongolian People's Republic
New Caledonia and Dependencies
Nepal
Nauru
New Zealand
Oman
Pakistan
Philippines
Papua New Guinea
Qatar
Saudi Arabia
Solomon Islands
American Samoa
Western Samoa
Singapore
Sri Lanka
Syria
Taiwan
Thailand
Tonga
Tuvalu
United Arab Emirates
Viet Nam
Vanuatu
Wallis and Futuna Islands
Yemen

APPENDIX D

Countries that form the Europe Region

(derived from "General Plan for the Development of the Interregional Telecommunication Network," CCITT-CCIR (1988))

Albania
Andorra
Austria
Belgium
Bulgaria
Cyprus
Czechoslovakia
Denmark
France
Finland
Germany
Gibraltar
Greece
Greenland
Hungary
Iceland
Italy
Ireland
Liechtenstein
Luxembourg
Monaco
Netherlands
Norway
Poland
Portugal
San Marino
Soviet Union
Spain
Sweden
Turkey
United Kingdom
Yugoslavia

APPENDIX E

TEUREM Group Members

Albania
Algeria
Andorra
Austria
Belgium
Bulgaria
Cyprus
Czechoslovakia
Denmark
Egypt
Finland
France
Gibraltar
Germany
Greece
Greenland
Hungary
Ireland
Israel
Italy
Lebanon
Libya
Liechtenstein
Luxembourg
Malta
Monaco
Morocco
The Netherlands
Norway
Poland
Portugal
Romania
San Marino
Spain
Sweden
Switzerland
Syria
Tunisia
Turkey
United Kingdom
USSR
Vatican City State
Yugoslavia

APPENDIX F

PROCEDURAL MATTERS

Final Regulatory Flexibility Analysis

I. Need and purpose of this action:

This Report and Order adopts procedural reforms to the Commission's International Settlements Policy that remove any U.S. regulatory impediments to lower, more economically efficient, cost-based international accounting rates and to expedite international calling price reductions for U.S. consumers.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

The Commission considered delaying implementation of an individual accounting rate under the notification option until other U.S. carriers have also reached agreement with the foreign correspondent on that rate. However, combination of a sworn statement required in notification letter that the carrier has not bargained for, nor has knowledge of, exclusive availability of the new accounting rate, and longstanding Commission policy that U.S. carriers should be afforded nondiscriminatory treatment in their traffic relations with a given country, are sufficient to monitor discriminatory offerings of new accounting rate.

The Commission considered that retroactive effective dates be permitted under the notification option. However, retroactive application of accounting rate reductions must continue to be subject to regulatory review in order to ensure that foreign correspondents are not simply extracting concessions from U.S. carriers, perhaps as a result of less favorable than expected financial results for the preceding year or quarter.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

Statement of FCC Chairman Alfred C. Sikes
Regarding the Commission's Companion International
Settlements & Accounting Rates Decisions
(CC Dockets 90-337, Phases I and II)

Foreword

International telecommunications routinely generates statistical superlatives. Between 1956 and 1988, for example, the cost per voice path via transatlantic cable fell from about $557,000 to $8,800. From 1965 to 1989, International Telecommunications Satellite Organization (INTELSAT) charges per voice channel declined by a factor of 132 to 1; those charges have dropped by a factor of 8 to 1 since 1980 alone.

The average price per international telephone call declined more than 55 percent between 1975 and 1988 -- from $21 to $9. U.S. industry international service revenues alone rose from $40 million in 1970, to more than $8 billion last year. The volume of international phone messages originating or terminating in the United States also grew nearly twenty-fold between 1975 and 1988, not counting service to and from Canada and Mexico.

Growing Disparities and Imbalances

Overshadowing this outstanding industry performance, however, has been the growing problem of America's net settlements deficit, addressed today in our companion decisions.

In general, customer prices for international calling are appreciably higher overseas than in the United States. That dampens calling demand abroad, and helps produce marked traffic imbalances between U.S. and foreign carriers.

Today, the United States generates far more international calls than it receives. Many foreign communications administrations also charge far more than their costs for terminating international calls, especially calls from the United States. Both because we make more calls and pay high, non-cost-based charges, the

United States currently pays out more than it receives. The U.S. net settlements deficit, moreover, has been rapidly growing -- from about $40 million in 1980, to more than $2 billion in 1989, an increase of some 5,000 percent.

Unfortunately, our international settlements deficit is more than keeping pace with growth in the market, and increasing by 20 percent a year. Compounded annually, that deficit doubles every 3.6 years. If current growth and foreign settlements practices are maintained, moreover, the deficit would reach more than $7 billion over the next seven years.

Significantly, there is also growing indication of discrimination. Many foreign telecommunications administrations apparently charge U.S.-based international carriers substantially higher accounting rates than charged other carriers in their geographic region. For example, as documented in our Report & Order, the telecommunications administrations of certain members of the Commission of the European Communities (EC) today charge U.S. carriers accounting rates which are more than twice those charged fellow EC-based carriers. A pattern of apparent discrimination can be discerned in other geographic regions.

Need for Action

Last year, this Commission commenced an inquiry into the way international payments are currently established. We suggested that rate negotiations among U.S. and foreign communications companies might well be undertaken with a view toward ameliorating this growing international settlements problem.

Changes have occurred. Canada, Britain, France, Hong Kong, the Netherlands, Singapore, and Sweden have recently instituted accounting rate reductions. In Japan, international calling prices -- collection rates -- have been reduced. German authorities have indicated that both accounting and collection rate reductions will be forthcoming. General public as well as business community pressures for price reductions, however, have been growing, both in the United States and abroad.

Hundreds of thousands of American and other Allied nations' military personnel, and their families, experienced first-hand the arcane -- and expensive-

- workings of the international accounting and settlements regime in conjunction with the Gulf War. For instance, many American servicemen and service women had families living in Britain, Germany, and the United States. Many British military had their families living in both the United Kingdom and Germany; and French soldiers had families in France and Germany. All of the Allied military stationed in the Gulf paid dearly to call home, as telephone prices reflected high, non-cost-based charges assessed by the Saudi Arabian telecommunications and other administrations. This, in turn, engendered many complaints in the United States and other countries.

Close Following of Developments

The Report & Order which we are adopting today directs U.S. international carriers promptly to commence negotiations with their foreign correspondents with the goal of establishing by 1993 accounting rates that are: (a) consistent with relevant cost trends; and (b) eliminate any non-cost-based disparities between the accounting rates applied by foreign carriers within their geographic region and those applied to calls from the United States. We also clearly signal our support for parallel international initiatives aimed at resolving these serious problems.

Our fundamental goal should be to bring the prices charged the public and business community more in line with actual costs. International communications users deserve more fully to benefit from the substantial cost reductions which modern technology and increased traffic volumes should make possible.

Together with the Commission staff, I intend closely to monitor U.S. carrier actions and international developments. The Further Notice of Proposed Rulemaking is designed to gather information. If the facts warrant, I will not hesitate to recommend that the Commission consider further action.

International communications should be a means of strengthening mutual respect and understanding, and furthering important goals including expanded, liberalized world trade. It should not be a process through which American international callers are, in effect, involuntarily burdened with excessive costs.

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